To Francis Lieber Esq

from Chas. F. Daly

HISTORICAL SKETCH

OF THE

JUDICIAL TRIBUNALS

OF

NEW YORK,

FROM

1623 TO 1846.

By CHARLES P. DALY,
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HISTORY

OF THE

COURT OF COMMON PLEAS

FOR THE

CITY AND COUNTY OF NEW YORK,

WITH AN ACCOUNT OF

THE JUDICIAL ORGANIZATION OF THE STATE

AND OF ITS TRIBUNALS,

FROM THE TIME OF ITS SETTLEMENT BY THE DUTCH, IN 1623, UNTIL THE ADOPTION OF THE STATE CONSTITUTION OF 1846.

The following sketch was written and has recently been published as an introduction to the first volume of the Reports of the New York Court of Common Pleas, by E. Delafield Smith, Esq. (1 *E. D. Smith*, xvii.) The court being the oldest judicial tribunal in this state, it became necessary, in preparing an account of it, to make a thorough investigation of the judicial history of the state, from its settlement to the present period. As it was essential, in such an investigation, to consult not only a number of works, historical, biographical, and otherwise, but to go into a very laborious examination of manuscript records and early colonial documents, it was felt that the information obtained should at least be preserved; and though it was not originally the intention of the writer to do anything more than to furnish, at the request of the reporter, a history of the court of common pleas, he finally concluded to connect with it an account of the judicial tribunals of the state from the time of its settlement. It was deemed the more necessary to do so, as every thing relating to the administration of justice during the early period of the colony of New York, or, as it was then called, New Netherland, has hitherto been involved in the greatest obscurity. Our first historian, Chief Justice Smith, devotes but a few pages to the period, and had little to communicate but the fact of the settle-

ment of the colony by the Dutch, and the particulars of its surrender to the English. The late Mr. Graham, who published, in 1834, a work on the jurisdiction of our courts, merely copied what he found in Smith, and went even so far as to assume that there was nothing remaining to show what courts existed among the Dutch, or that would shed any light upon the manner in which justice was administered by them. He appears to have relied upon the absence of any information in the pages of Smith, and to have made no investigation himself, for, on the contrary, the records of these early courts, in the Dutch language, from the first establishment of a regular and fixed judicial tribunal, until the close of the Dutch dynasty, have always remained in the city of New-York. It is nearly the same in respect to the first half century after the colony had passed into the hands of the English. All that has been known of the tribunals which then existed, is what has been furnished by Smith. But though his work was written nearly a century ago, and it might be supposed, as he was a lawyer by profession, that he would have taken some pains to investigate, his account, on the contrary, is not only very meagre, but grossly inaccurate. In respect to his own period, and for a quarter of a century before it, he was well informed; but in all that relates to a period anterior, his history is of little or no value. Since his time, no attempt has been made thoroughly to investigate the subject. Indeed, without the aid of the documentary information, obtained by Mr. Brodhead from the state offices at London and at the Hague, it would have been difficult to do so. The deposit, however, in the state department at Albany, of copies of the documents found by Mr. Brodhead, has supplied facts heretofore wanting, while the admirable arrangement and classification of the colonial manuscripts, by Dr. O'Callaghan, has enabled an investigator to get at sources of information which before were scarcely within his reach. To the latter gentleman the writer returns his acknowledgments for facilities afforded in inspecting these manuscripts, for much valuable information, and many useful hints in the course of his inquiries.

The colony of New Netherland was planted by the West India Company, a commercial corporation of Holland. This corporation had obtained from the states general an exclusive charter or patent, to found colonies and carry on trade, navigation and commerce upon the coast of Africa, North America and the West Indies;[1] and, for this purpose, was invested, among other things, with the most comprehensive judicial powers. It was exclusively entrusted with the administration of justice in the colonies it should establish, having the right to appoint governors, officers of justice, and all other public officers; to maintain order and police, and generally, in the language of the charter, to do all that the service of those countries might require.[2] The government of this gigantic corporation was vested in five separate chambers, to one of which, the chamber of Amsterdam, was committed the management of the affairs of New Netherland, the general executive power of the whole body being entrusted to nineteen delegates, representing conjointly the separate chambers and the states general, and which was known by the appellation of the College of Nineteen. The colony of New Netherland was formally organized by May, the first director or governor appointed for it by the Amsterdam chamber, and a settlement was established at Manhattan, the present site of the city of New York, in 1623. May's

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[1] Brodhead, 134. O'Call. 184.

[2] O'Callaghan, App. 400; Charter, art. 2.

administration lasted but a year, and whether during this brief period, or in that of his successor, Verhulst, whose rule was equally short, any provision was made for the administration of justice, there is now no means of determining. The number of the colonists, however, was so small, and they were so fully occupied in providing for their immediate wants, that there could be little, if any, occasion for organizing a judicial tribunal. In 1626, Minuit came out as governor. He had, to assist him, a council of five, who, with himself, were invested with all legislative, executive and judicial powers, subject to the supervision and appellate jurisdiction of the chamber at Amsterdam.[1] There was also attached to this body an officer, well known in Holland by the title of the Schout Fiscal. He was a kind of attorney general, uniting with the power of a prosecuting officer the executive duties of a sheriff; a more particular enumeration of whose duties, from the careful compilation of Dr. O'Callaghan, will be found in a note.[2]

To the governor, his council, and the schout fiscal, the administration of justice was left during the six years that Minuit was governor, and the four years of his successor, Van Twiller, that is, from 1626 to 1637. In what manner judicial proceedings were conducted is unknown. Records were kept under Van Twiller, but they are now irretrievably lost.[3] His schout fiscal, however, Lubbertus Van Din-

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[1] Brodhead, 162. This council had criminal jurisdiction to the extent of fine, &c.

[2] He was charged specially with enforcing and maintaining the placards, ordinances, resolutions and military regulations of the high mightinesses, the states general, and protecting the rights, domains and jurisdiction of the company, and executing the orders as well in as out of court, without favor or respect to individuals; he was bound to superintend all prosecutions and suits, but could not undertake any actions on behalf of the company, except by order of the council, nor arraign nor arrest any person upon a criminal charge, unless upon information previously received, or unless he caught him in *flagrante delictu*. In taking information, he was bound to note as well those points which made for the persons as those which supported the charge against him, and after trial, he was to see to the faithful and proper execution of the sentence, pronounced by the judges, who, in indictments carrying with them loss of life and property, were not to be less than five in number. He was, moreover, specially obliged to attend to the commissions arriving from the company's outposts, and to vessels arriving from or leaving for Holland, to inspect their papers, and superintend the loading and discharging of the cargoes, so that smuggling might be prevented; and all goods introduced, except in accordance to the company's regulations, were at once to be confiscated. He was to transmit to the directors in Holland, copies of all information taken by him, as well as of all sentences pronounced by the court, and no person was to be kept long in prison, at the expense of the company, without special cause, but all were to be prosecuted as expeditiously as possible before the director and council. * * * He was strictly forbidden to accept presents or gifts from any person whatsoever, and had to content himself with the civil fines and penalties adjudged to him, and such part of the criminal fines and confiscated wages of the company's servants as the director and council, after prosecution, might allow. He was not to have any part, however, of captured prizes or confiscated goods.

[3] Mr. Brodhead informed the writer that when, in pursuance of an act of the legislature, he was sent to Holland in 1841, to collect information respecting our early colonial history, he found that the voluminous archives of the Dutch West India Company had been sold but a few years before his arrival, as waste paper. Had the legislature acted upon the suggestion of Governor Clinton, in 1816, the records of this company, covering the whole period of the Dutch dynasty, and including all the private correspondence between the directors in Amsterdam and their agents in New Netherland, would, upon request, have been willingly presented to the state, by the Dutch government. The sale had been so recent, that Mr. B. was enabled to discover some of the purchasers; but he found in the process of sale and resale, that the papers had passed into the hands of innumerable small dealers in the Dutch metropolis, and had been used as wrappers for merchandise, and that the great bulk of them had been scattered and appropriated to similar uses, along both banks of the Rhine. In the indefatigable search which he instituted, he was enabled to rescue some fragments, but the amount obtained was very trifling.

clage, was a doctor of laws, and a man of ability; and as long as he continued to act, it may fairly be presumed, that the management of judicial matters was under his charge. In 1630, extensive grants of lands in New Netherland were made by the West India Company, to certain patroons, who were invested with the feudal privileges of manorial lords. They were authorized to erect courts of justice, and courts known as the patroons' courts were accordingly established, exercising unlimited civil and criminal jurisdiction within the patroons' territory. In these tribunals the patroon presided in person, or by deputy. He was clothed with the power of life and death, and could decide all civil suits arising within his jurisdiction, subject—where he rendered judgment for a sum exceeding fifty guilders—to an appeal to the director general and council of New Amsterdam. This right of appeal was reserved by the original charter, under which the patroons held, but it was practically defeated by exacting from the tenants, before they came upon the manor, a condition that they would in no case appeal from the judgment of the manorial court.[1]

In 1638, William Kieft was appointed governor. This governor was a grasping, arbitrary, narrow-minded man, full of his own importance, with a restless activity, that was never turned in any right direction, or applied to the accomplishment of any wise purpose. During the nine years that he misgoverned the colony, he retained in his hands the sole administration of justice. In obedience to his instructions, it was necessary that he should keep up the form of a council, but that he might enjoy exclusive control, he reduced it to one member, reserving two votes to himself.[2] In 1640, a charter of exemptions and privileges, designed to encourage emigration, was adopted by the College of Nineteen, in which it was declared that the governor and council should decide all questions respecting the rights of the company, and all complaints, whether by foreigners or inhabitants of the province; that they should act as an orphan's and surrogate's court, judge in criminal and religious affairs, and administer law generally. In conformity with the charter, Kieft directed that the council should sit every Thursday, as a court of justice, for "the hearing and adjudication of all civil and criminal processes, and for the redress of all grievances of which any one might have to complain;" and he established certain rules for securing the attendance of parties, and for the general conduct of business.[3] In a court thus constituted, guided and controlled by a man vain, rapacious and vindictive, it may readily be imagined in what way justice was administered. He enacted laws, levied fines, or inflicted penalties according to his will. The schout fiscals, of whom there were two during his governorship, Ulrich Lupold and Cornelius Vander Huygens, were occasionally invited to be present at the sittings of the council, but neither they nor his counsellor, Doctor Johannes La Montague, a learned Huguenot physician, appeared to have had much weight with him. Ever involved in trouble, either with the natives or with the colonists, he was constantly inflicting fines, confiscations and banishments; and though an appeal lay from his judicial decisions to the chamber of Amsterdam, he effectually cut it off, by subjecting to fine or imprisonment any one who attempted to resort to it.[4] Such an administration was fruitful at least

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[1] Brodhead, 304.
[2] Brodhead, 327.
[3] 1 O'Call. 184. Brodhead, 277.
[4] Riker's Annals of Newtown, 23.
Breeden Raedt, (*Broad Advice,*) printed at Antwerp, 1650, and attributed to Cornelius Melyn,

of one result. It stirred up the colonists to demand the establishment of judicial and municipal tribunals, similar to those which they had enjoyed in Holland. There had existed in every town and village in Holland, for more than a century, a local tribunal of a highly popular character. It united the twofold functions of a court of justice and of a municipal government, and consisted of a bench of magistrates, denominated burgomaster and schepens, with whom were associated a schout, whose especial duty it was to prosecute all offenders before the court, and to carry into execution its resolves or decrees. The burgomaster was a kind of mayor. The schepen resembled an alderman, and the schout performed the duties which, under our system, are respectively assigned to sheriffs and district attorneys. The principle of popular representation was recognized in the composition of this body. The mode of appointment was not uniform throughout Holland; but generally the inhabitants of the town who were possessed of a certain property qualification, assembled annually in a town council or "*Vroedschap*," and elected eight or nine "good men," and this representative body chose the burgomaster and schepens. The schout, under the feudal law, was appointed by the count or manorial lord, though in certain places, as in the city of Amsterdam, he was chosen by the burgomaster and schepens.[1]

Kieft wished to go to war with the Indians, but, unwilling to take the entire responsibility of such a step, he deemed it prudent to call the community together and submit the question to them. The heads of families met, and according to the custom of Holland, selected twelve men to represent them. This representative body assented to the war; but, at the same time, presented a memorial to the governor, demanding, among other reforms, the establishment of courts of justice similar to those which existed in the towns and villages of Holland.[2] This privilege Kieft felt no disposition to grant, and after evading the request for some time, he finally got rid of it, by dissolving the popular body. Two years later, however, having, by his rashness and folly, brought the colony to the brink of ruin, he found it necessary again to convoke the community. They met, as before, and selected "eight men" to advise upon the state of affairs. This second representative council did not trouble Kieft with any further requests; but they addressed an earnest memorial to the College of Nineteen, and to the states general, describing the condition of the colony, and demanding a new governor, and the establishment, in New Amsterdam, of a burgher government, according to the custom and usage of Holland; a request that produced no other effect but the recall of Kieft and the appointment of Stuyvesant.[3]

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president of the "board of eight men." This rare tract has been translated by Henry C. Murphy, Esq., and a few copies have been printed for private circulation, by James Lennox, Esq.

Vertoogh, Van N. N., printed at the Hague, 1649, and attributed to Adrian Van der Donck. This has also been translated by Mr. Murphy, and printed, together with the Breeden Raedt, by Mr. Lennox, and by the N. Y. Hist. Soc. 2 Coll. 2d series, 251. Brodhead, 277. A translation will also be found in the Holland documents, iv. 74.

[1] Esprit Origine et Progress des Institutions Judiciaries des principaux pays de l'Europe, par J. D. Myer, Paris, 1823; tome iii., livre 5, coup d'oiel, sur l'etat, politique des Pays Bas. chap. 11, 253, chap. 14, 387. Placards of Hollande, vol. ii. 695. Van Leuwen's Roman Dutch Law, book 1, chap. ii. §§ 19, 20, 21. Vander Linden's Institutes of Holland, part 1, book 3, chap. 1. O'Call. i. 391; ii. 210. Brodhead, 453.

[2] Brodhead, 326.

[3] Brodhead, 364.

Peter Stuyvesant came out as governor in 1647. Van Dinclage, who had acted as schout fiscal under Van Twiller, came with him, in the capacity of vice director, and Hendrick Van Dyck as schout fiscal. Immediately after his arrival, Stuyvesant established a court of justice, of which Van Dinclage was made the presiding judge, having associated with him, occasionally, others of the company's officers. The new tribunal was empowered to decide "all cases whatsoever," subject only to the restriction of asking the opinion of the governor upon all momentous questions, who reserved to himself the privilege, which he frequently exercised, of presiding in the court, whenever he thought proper to do so.[1]

The desire for a popular form of government became so strong after Stuyvesant's arrival that he found it necessary to make some concession. He allowed the commonalty to elect eighteen persons, from whom he selected nine, as a permanent body to advise and assist in public affairs. This body, who were known as the board of the nine men, had certain judicial powers conferred upon them. Three of their number attended in rotation upon every court day, to whom civil cases were referred as arbitrators, and their decision was binding upon the parties, though an appeal lay to the governor and council, upon the payment of one pound Flemish. These tribunals, with the manorial courts before referred to, constituted the judicial organization of the colony for seven years afterwards.

The government of Stuyvesant but increased the popular discontent. Though a man of capacity and integrity, he was unfitted for the place assigned him, or his duty as the careful guardian of the pecuniary interests of a commercial corporation, was inconsistent with the just and politic rule of a people like the colonists, who had their own views as to the manner in which a community should be governed. It was natural that they should desire to live under institutions to which they had been accustomed in Holland, and which, whatever might be their advantages or defects, had to them the merit of nationality, and were associated with their earliest recollections. This Stuyvesant did not, or would not, see. Strongly conservative himself by nature, and long used to military rule, he saw in a demand so just and reasonable, nothing but a desire to break loose from the restraints of lawful authority. Though not an unjust man, he felt himself warranted in resorting to any means to crush every thing in the shape of popular encroachment, and, as he was both prompt and energetic, his government became insufferably oppressive. Before the end of two years he was in open collision, not only with the board of nine men, but with the schout fiscal, Van Dyck, and the vice director, Van Dinclage, an enlightened and learned man, and the most influential member of his council. The council he was enabled to control, but not so with the popular body. In one of its members, Adrian Van der Donck, he had to cope with a man whose ability and energy was equal to his own. Instigated by Van der Donck, the board of nine men resolved to send a delegation to Holland, but they had no sooner decided upon this step than Stuyvesant arrested its projector, seized his papers, and procured a decree of the council removing him from his position as one of the popular representatives. But this violent and arbitrary measure did not produce the effect expected. The nine men met together, a spirited remonstrance was prepared to the states general,

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[1] Breeden Raedt, extracts in 4 Doc. Hist. of N. Y. 69. Albany Rec. 20, 28, 29, 38, 56 to 61. 2 O'Call. 24 to 31. Brodhead, 467, 523, 532.

and three of the number, of whom Van der Donck was one, went with it as a deputation to Holland.

This mission was so far successful, that in 1650, a provisional order was made by the states general, which, among other things, decreed, that a court of justice should be erected in New Netherland, and that a burgher government should be established in New Amsterdam, to consist of two burgomasters, five schepens and a schout, and that in the mean time, or for three years, the nine men should continue to exercise judicial powers in the trial of civil causes.[1] This order was resisted by the Amsterdam chamber as a violation of the privileges granted by their charter, and Stuyvesant, no doubt under instructions from them, refused to obey it.[2] When it was known at New Amsterdam that Stuyvesant would not comply with the order, the nine men again appealed to the home government, and Van der Donck, who had remained in Holland, appeared as their advocate before the states general. A long struggle ensued, during which Stuyvesant grew more violent and unreasonable. He imprisoned Van Dinclage for uniting with Van der Donck in a protest to the states general, dismissed the schout fiscal, Van Dyck, from office, for co-operating with the nine men, and followed up these arbitrary and illegal acts, by equally violent measures against other leaders of the popular movement.[3] The Amsterdam chamber, who regarded the establishment of a burgher court as likely to prove detrimental to the interests of their commercial monopoly, employed every means to counteract the efforts of Van der Donck; but after maintaining the contest for two years, they at last thought it prudent to yield, and signified to Stuyvesant their assent to the wishes of the colonists. The inhabitants of New Amsterdam were to be allowed to elect a schout, two burgomasters and five schepens, "as much as possible according to the custom of old Amsterdam," and the magistrates, thus elected, were to compose a municipal court of justice, subject to the right of appeal to the supreme court of the province. "We have resolved," they wrote to Stuyvesant, "to permit you hereby to erect a court of justice, (*een banck Van Justitië,*) formed as much as possible after the custom of this city; to which end, printed copies relative to all the law courts here, and their whole government, are transmitted. And we presume that it will be sufficient, at first, to choose one schout, two burgomasters and five schepens, from all of whose judgment an appeal shall lie to the supreme council, where definite judgment shall be pronounced."[4] It was evident, from the order of the states general, that these officers were to be elected by the commonalty, as was customary in the cities, towns and villages of Holland; and such would seem to be the direction in the dispatch of the Amsterdam chamber. The language of the dispatch was, perhaps, a little ambiguous, and Stuyvesant, putting the construction upon it that conformed most with his own views, and which, if erroneous, he perhaps felt would not be unpalatable to his employers, resolved to appoint the new magistrates himself. He not only determined thus to keep the power in his own hands, but he practically defeated the provision that had been made for a city schout, by appointing to that office Cornelius Van Tienhoven, a man of depraved and dissolute life, exceedingly obnoxious to the colonists, whose only recommendation was the ability he had

[1] Brodhead, 514.
[2] 2 O'Call, 210. Brodhead, 540. 2 Doc. History of N. Y.
[3] Brodhead, 525, 532.
[4] 1 N. Y. Doc. History, 387.

shown in carrying out the measures of his headstrong and arbitrary superior. By this means, the two offices of city schout and schout fiscal were united in the same person. Stuyvesant even went so far as to refuse to allow the new magistrates to appoint their own clerk, though it had been the usage in Amsterdam from the time that that city had had a burgomaster; and as a crowning act, he informed the new tribunal, that its establishment or the scope of its authority did not in the slightest degree diminish the power of himself and his council, to pass whatever laws or ordinances they pleased, for the municipal government of the city.[1]

On the second of February, 1653, he issued a proclamation, appointing as burgomasters, Arent Van Hatten and Martin Krieger, and as schepens, Paulus L. Van der Grist, Maximillian Van Gheel, Allard Anthony, Peter W. Cowenhoven and William Beekman. Five days afterwards, the newly appointed magistrates assembled; Van Tienhoven, the schout fiscal, attending in his additional capacity of city schout, with Jacob Kip, who had been appointed secretary or town clerk, a station he continued to fill for many years afterwards. No business was transacted, other than to give notice that the court would meet for "the hearing and determining of all disputes between parties, as far as practicable, in the building heretofore called the City Tavern, now the Stadt House, (City Hall,) on every Monday morning, at 9 o'clock." The Stadt House not being ready on the day appointed, the next meeting took place four days afterwards at the Fort, where the court was duly organized for the dispatch of business, and the proceedings opened with prayer; the following eloquent extract from which will show the sense entertained by these new magistrates of the duties and obligations of the judicial office:

We beseech thee, Oh! Fountain of all good gifts, qualify us by thy grace, that we may, with fidelity and righteousness, serve in our respective offices. To this end enlighten our darkened understandings, that we may be able to distinguish the right from the wrong, the truth from falsehood, and that we may give pure and uncorrupted decisions, having an eye upon thy Word, a sure guide, giving to the simple wisdom and knowledge. Let thy law be a lamp unto our feet and a light unto our paths, that we may never turn away from righteousness. Deeply impress on all our minds that we are accountable not to man, but to God, who seeth and heareth all things. Let all respect of persons be far removed from us, that we may award justice unto the rich, and unto the poor, unto friends and enemies; to residents and to strangers, according to the law of truth, and grant that not one of us, in any instance, may swerve therefrom; and as gifts do blind the eyes of the wise, and destroy the heart, keep, therefore, our hearts in judgment. Grant unto us, also, that we may not rashly prejudge any one, but that we patiently hear all parties, and give them time and opportunity for defending themselves; in all things looking up to Thee and to thy Word for counsel and direction.[2]

It was the intention that the municipal government conceded to New Amsterdam should conform, as far as practicable, to that of the parent city. How essentially Stuyvesant departed from this in the outset, has been already shown, and his resolving that the burgher government did not diminish the right of himself and his council to regulate municipal affairs, left the precise powers of the new tribunal very indefinite and uncertain. It led, at the commencement, to an organization of the municipal government, in many respects different from that of Amsterdam, and to great unwillingness at first, on the part of the burgomasters and schepens, to

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[1] N. Y. Rec. of Burgomasters and Schepens, vol. i. Brodhead, 548.

[2] N. Y. Rec. of Burg. and Schep. i. 3.

interfere at all in municipal matters. In Amsterdam there were four burgomasters, each of whom attended three months of the year, in rotation, at the city hall, for the despatch of public business, and the schepens, who were nine in number, held the regular court of justice, having civil and criminal jurisdiction, which was almost unlimited. The duties of the schepens were especially judicial, while those of the schout and the burgomasters were chiefly executive, and the three bodies, when assembled together, constituted a "college," for the enactment of municipal ordinances and laws, under the title of "the lords of the court of the city of Amsterdam." There was also a permanent council, composed of thirty six members, the nature of which need not be explained.[1]

Though this division of duties and labors was highly essential in a city of the magnitude of the Dutch commercial metropolis, it was not so necessary in a small community, like that of New Amsterdam, which, at the period in question, could not have embraced much over seven hundred inhabitants.[2] From this cause, perhaps, as well as from the uncertainty respecting the precise distribution or extent of their duties, occasioned by the notice they had received from Stuyvesant, the newly appointed officers assembled together as one body, and in that united capacity continued thereafter to discharge legislative, judicial and executive functions. In the towns and villages of Holland, the schout was the chief officer of the board. He convoked the court, and presided at the head of it, but without taking any part in its proceedings, other than in collecting the votes. His position was somewhat analogous to that of the speaker or the president of a legislative assembly, except that he had no vote, though he might express his opinion, and he was obliged to quit the bench when he acted as prosecuting officer, the oldest burgomaster then presiding in his stead.[3] In New Amsterdam, however, Arent Van Hatten, being the first named as burgomaster, assumed the presidency of the court,[4] and after he retired from office, the eldest burgomaster continued to act in that capacity until 1656,[5] when Stuyvesant ordered that the presidency should be changed every three months, which continued until 1660, in which year the colonists obtained what they had long petitioned for, a separation of the office of city schout from that of the schout fiscal. This separation had in fact been made six years before, and a city schout appointed by the Amsterdam chamber, but this officer, Jochem T. Kuyter, having been killed in a collision with the Indians, before he could enter upon the duties of his office, Stuyvesant retained the schout fiscal, Van Tienhoven, in the discharge of the duties of city schout, and persisted, against the urgent remonstrance of the inhabitants in continuing him and the succeeding schout fiscal, Nicasius de Sille, as city schout, until the Amsterdam chamber finally appointed to the post Peter Tonneman, who had formerly been schout of a district of Dutch towns on Long Island. Tonneman received his appointment in Holland, and when he came out, he insisted upon his right to the presidency of the court. In this he was supported by

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[1] J. Wagenaar, Amsterdamsche Geschiedenissen, 1740. Meyer's Institutions Judiciarics, tome iii. livre 5, chap. 11, 253. Ordinances of Amsterdam, vol. ii. p. 695. Vander Linden, 379. 2 O'Call. 210.

[2] Valentine's History of the City of New York, p. 53. Brodhead, 548.

[3] Van Leuwen, book 1. chap. 1. sec. 21. Meyer's Institutions Judiciaries, tome iii. livre 5, chap. 11, 253. Vander Linden, 377. Brodhead, 674.

[4] N. Y. Rec. of Burg. and Schep. i. 4.

[5] N. Y. Rec. of Burg. and Schep. ii. 488.

Stuyvesant, who went personally before the burgomasters and schepens, and insisted not only that Tonneman should sit at the head of the court, but that he should have a vote in all matters in which he was not a party, a privilege never granted to the schouts in Holland. The burgomasters and schepens resisted, but after a long and angry discussion, it was finally agreed that Tonneman should have what he claimed, until the question should be determined by the "Lords Majores," in Holland. It does not appear whether any further action was had in the matter, but the name of Tonneman was continued thereafter upon the records as the chief or presiding officer.[1] In 1657, that branch of municipal affairs which especially required the discharge of executive duties, had increased so largely, that the burgomasters organized a separate court, which met every Thursday, to dispose of it.[2] In view of the serious encroachment made upon their time by the accumulation of duties, or as they expressed it, the impossibility of attending to their private affairs, the burgomasters petitioned Stuyvesant to be released thereafter from attending the burgher court, but he refused to grant it, and the court continued in the discharge of mixed legislative and judicial functions as long as the Dutch held possession of the province.

The proceedings of this tribunal, or, as it was denominated, "the worshipful court of the schout burgomaster and schepens," were all recorded by their clerk or secretary; and as every thing that took place before it, the nature of the claim, or of the offence, the statements of the parties, the proof and the decision of the court, with the reasons assigned for it, were carefully noted and written down, these records supply a full account of the whole course of its proceedings, and furnish an interesting exposition of the habits and manners of the people. Upon perusing them, it is impossible not to be struck with the comprehensive knowledge they display of the principles of jurisprudence, and with the directness and simplicity with which legal investigations were conducted. In fact, as a means of ascertaining truth, and of doing substantial justice, their mode of proceeding was infinitely superior to the more technical and artificial system introduced by their English successors. None of these magistrates were of the legal profession. They were all engaged in agricultural, trading or other pursuits, and yet they appear to have been well versed in the Dutch law, and to have been thoroughly acquainted with the commercial usages, customs and municipal regulations of the city of Amsterdam. This is the more remarkable, as a knowledge of the Dutch law at that period was by no means of easy acquisition. Though the principles and practice of the civil law prevailed in Holland, it was greatly modified by ancient usages; some of them of feudal origin, others the result of free institutions, which had existed from the earliest period; and it had engrafted upon it a number of public regulations or ordinances, emanating from the different provinces, as distinct and partly independent sovereignties, which had originated either as feudal privileges or sprung up during Spanish domination, or were the result of the long struggle and many political changes which the low countries had passed through before the general establishment of free institutions. In every town and village in Holland, moreover, there existed usages and customs peculiar to the place, which had the force of law, and were not only different in different towns, but frequently directly opposite. The Dutch law, in fact, was then a kind of irregular mosaic, in which might be found all the principles as well as the details of

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[1] N. Y. Rec. of Burg. and Schep. v. 414, 484.

[2] N. Y. Rec. of Burg. and Schep. Ordinances of Burgomasters.

a most enlightened system of jurisprudence; but in a form so confused as to make it exceedingly difficult to master it.[1] That these magistrates should have had any general or practical acquaintance with such a system at all, was scarcely to have been expected; but that they had, is apparent, not only from the manner in which they disposed of the ordinary controversies that came before them, but in their treatment of difficult questions as to the rights of strangers, their familiarity with the complicated laws of inheritance, and the knowledge they displayed of the maritime law while sitting as a court of admiralty. The Amsterdam chamber sent out to them the necessary books to guide them, as to the practices of the courts of Amsterdam, and when the province passed into the hands of the English, there was attached to the court a small but very select library of legal works, mainly in the Dutch language. There were, moreover, men educated to the legal profession, in the colony. Van Dinclage, the vice director, who had acted as schout fiscal for Van Twiller, and chief judge of the court established by Stuyvesant, was a doctor of laws, and there is sufficient known respecting him, to warrant the opinion that he was an able and accomplished jurist. Van der Donck was admitted to the same honorable degree in the University of Leyden, and was afterwards an advocate of the supreme court of Holland.[2] The schout fiscal, Nicasius de Sille, who acted as city schout for four years, is stated in his commission from the Amsterdam chamber to be "a man well versed in the law."[3] In addition to these, there were several notaries. Dirk Van Schellyne, who came out in 1641, had previously practiced at the Hague; David Provorst discharged the duties of notary for some years before Schellyne's arrival,[4] and there was another notary named Matthias de Vos.[5] Under the civil law as it prevailed in Holland, a considerable part of the proceedings in a cause, if it was seriously contested, was conducted by the notary, who was required, at least, to be well versed in the manner of carrying on legal controversies; and as he was frequently consulted by suitors for advice as to their rights and liabilities, he was generally well informed and capable of giving it.[6] Such was the case with Van Schellyne, who, from the records he has left, was evidently an experienced and skillful practitioner. He was not only connected with the court in the discharge of his duties as notary, but he was appointed by it, in 1665, high constable, (*conchergio.*)[7] All of these men must have had more or less to do with establishing the mode of legal proceeding, and of advising and guiding the magistrates. Van Schellyne and De Sille were in constant official communication with them. Van Dinclage must have brought into use the forms of legal procedure in the court over which he had presided, and Van der Donck was one of the chief getters up of the new tribunal; and though he survived

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[1] H. Fagel and J. C. Van der Hoop, Dissert. de usu Juris Romani in Hollandia Hag, 1779. F. Van Mieris Groot Charterbock der Graaven Van Holland, Leid, 1753–4. Deelen Cau en Scheltus, Placaat Boek Van de Staaten Generaal Van Holland, en Van Zeelend, 9 Declen, edition of 1658. Actes des Etats Généraux de 1600. Recuielles et mis en ordre, par M. Gachard Bruxelles, 1849. Oeuvres de Raepsait, tome iii. Des Droit des Belgis et Gaulois. Meyer's Institutions Judiciaries, tome iii, livre 5, chap. 11.

[2] 2 O'Call. 550.

[3] Brodhead, 561. 5 N. Y. Rec. of Burg. and Schep. 5.

[4] 3 N. Y. Rec. of Burg. and Schep. 101.

[5] 5 N. Y. Rec. of Burg. and Schep. 642.

[6] S. Van Leuwen Practyk der Notarissen, Rott. 1742.

[7] N. Y. Rec. of Burg. and Schep. ii. 642.

its creation but two years, he was no doubt advised with and consulted in respect to its organization, and as to the mode in which it was conducted. We find him in fact, the very year that it was established, claiming its protection as a "citizen and burgher," against the menaces of Stuyvesant.[1] The court was required, in all its determinations, to regard as paramount law, all regulations established by or instructions received from the chamber of Amsterdam or the College of Nineteen, for the government of the colony. Next, all edicts or ordinances duly established by the governor and council; then the usages, customs or laws prevailing in the city of Amsterdam, and where they furnished no guide, the law of the fatherland, by which was more particularly understood the ordinances of the province of Holland and of the states general, and the civil law as it prevailed in the Netherlands, or, as it is denominated by jurists, the Roman Dutch Law.

The burgomaster and schepens had constantly demanded from Stuyvesant that they should be allowed to nominate a double number of persons, from whom their successors should be chosen, as a partial approximation to the privileges enjoyed in the Netherlands, or, as they expressed it, "in the beloved city of Amsterdam;"[2] but he continued the old magistrates, merely supplying vacancies, until 1656, when he consented, with the proviso that the old magistrates should always be considered as re-nominated—which left it in his power to continue them precisely as he had done before. The condition was accepted, and the nominations made; but Stuyvesant, being displeased with some of the new names, continued the old magistrates, merely supplying vacancies, until the time for reappointment came around, in 1658, when he at last gave way, and selected, from a double list of names presented to him, the magistrates who were to serve. The burgomaster and schepens then selected, continued in office until 1660, when a new nomination and appointment was made every year, in the month of February,[3] which was continued thereafter, until the English changed the organization of the court. All these magistrates, as far as can be gathered, were men of intelligence, of independence, and, with one or two exceptions, of high moral character, evincing in the discharge of their duties, and especially in those of a judicial nature, that unswerving adhesion to established rules and customs, that sterling good sense, and strong love of justice, which constitutes so marked a feature in the Dutch national character.

The right which Stuyvesant claimed, of interfering in the administration of city matters, appears to have been confined to what related to the general regulation of the city's affairs, and not to the administration of justice between particular individuals, or as against public offenders. Upon the former matter, he and the burgomaster and schepens came frequently in collision; and he sometimes gave vent to his anger at their insolence and presumption, by a public proclamation, in which they were contemptuously referred to as "the little bench of justice;"[4] but he seems to have abstained from any interference with their judicial powers. At first he was disposed to limit their action in criminal cases; but finally he suffered them to ex-

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[1] N. Y. Rec. of Burg. and Schep. i. 321.

[2] New Amsterdam Rec. 359, 373, 375.

[3] Rec. of N. Y. Burgomasters and Schepens, iv. 299.

[4] Documents of Stuyvesant's Council in N. Y. Record of Burgomasters and Schepens, 26th of February, 1654.

ercise unlimited criminal and civil jurisdiction, except the infliction of punishment in capital cases. The mode of proceeding in civil cases was simple and summary. The court was held once every fortnight, though frequently once every week, upon a stated day. Attached to the court was an officer, known as the court messenger, who, at the verbal request of the party aggrieved, summoned the adverse party to appear at the next court day. If the defendant failed to appear, he incurred the cost of the summons, lost the right to make any objection to the jurisdiction of the court, and a new citation was issued. If he failed again, he incurred additional costs, lost the right to make all "dilatory exceptions," or to adjourn, or delay the proceeding. He was then cited for the third time, and if he did not then appear, the court proceeded to hear the case and give judgment, and he was cut off from all right of appeal or review. But if, upon hearing the plaintiff's case, the court deemed the presence of the defendant essential, they might issue a fourth citation, in the nature of an arrest, and compel his appearance. Parties, however, usually attended upon the first citation. The plaintiff stated his case, and the defendant made his answer. If they differed in a fact which the court thought material, either party might be put to an oath; and, if they were still in conflict, the court might require the examination of witnesses, and the matter was adjourned until the next court day, during which time either party might take the depositions of his witnesses, before a notary, or the court might require that the witnesses should be produced, to be examined orally before it, at the adjourned day, under oath. But, most generally, the matter was disposed of upon the first hearing of the parties, without resorting to the oath, or the examination of witnesses. If it was intricate, or it was difficult to get at the truth, it was the constant practice to refer the cause to arbitrators, who were always instructed to bring about a reconciliation between the parties, if they could; and this was not confined merely to cases of disputes about accounts, or to differences growing out of contracts, but it extended to nearly every kind of case that came before the court. The arbitrators were left to the choice of the litigants, or appointed by the court, or one of the schepens was directed to take the matter in hand, and try and reconcile the contestants. If no reconciliation could be effected, or the parties would not submit to the final determination or conclusion of the arbitrators, the dissatisfied party might again bring the matter before the court, where it was finally disposed of. These references were frequent upon every court day. In fact, the chief business of this tribunal was, in acting as a court of conciliation; and it is worthy of remark, that though the amount involved was frequently considerable, or the matter in dispute highly important, that appeals to the court from the decision of the arbitrators were exceedingly rare. Indeed, the first appeal to be found upon the records was brought by a stranger.[1]

There was a more formal mode of proceeding, if parties preferred it. After the plaintiff had stated his case, the defendant might require him to put it in writing, and a day was given for that purpose. The defendant was then obliged to answer in writing, to which the plaintiff could reply, and the defendant rejoin, and there ended the pleadings. Each party then went before the notary of his choice, and had the depositions of his witnesses reduced to writing, a draft or copy of which was re-

[1] N. Y. Rec. of Burgomasters and Schepens, i. 188, 231; ii. 10, 176; iii. 188; v. 190; vi. 474 vii. 180.

tained by the notary, in a book kept by him for the purpose; and where it was necessary, a commission, or, as it was called, a *requisitory letter*, might be obtained for the examination upon interrogation of witnesses residing beyond the court's jurisdiction, who were examined before the judges of the local court where the witness resided, who sealed up the examination, and transmitted it to the court having jurisdiction of the cause. When the proofs were complete, they were added to the pleadings, the whole constituting what was called the memorial, which was submitted to the court, either party being at liberty to inspect it, and having the right, within a certain time, to have any of the witnesses of his adversary examined upon cross interrogatories, in respect to anything contained in their deposition, which was deemed material, or to have additional witnesses examined on his own behalf in reply; the manner of conducting which subsequent examination was arranged by the judge. But this mode of proceeding being dilatory and expensive, was rarely resorted to. The great majority of cases were referred to arbitration, or disposed of upon a summary hearing of the parties before the magistrates; and it may be important to note, in respect to the rules of evidence, that whenever a paper or document was produced, purporting or avowed to be in the handwriting of a party, it was assumed to be his handwriting, unless he denied the fact under oath; and that merchants or traders might always exhibit their books in evidence, where it was acknowledged or proved that there had been a dealing between the parties, or that the article had been delivered, provided they were regularly kept with the proper distinction of persons, things, year, month and day—a practice which, in the states of New Jersey and New York, survived these Dutch tribunals, and has, at the present day, with certain qualifications or restrictions, extended to nearly every state in the Union. Full credit was given to all such books, especially where they were strengthened by oath, or confirmed by the death of the parties, and also to memorandums, made between parties by sworn brokers. A leading distinction in evidence was also made between what was termed *full proof*, as where a fact was declared by two credible witnesses, as of their own knowledge, or it was proved by a document or written paper, and *half proof* as where it rested upon the positive declaration of knowledge by one witness only, under which latter head, as weak but assisting evidence, hearsay was allowed, which, in some instances, as in the case of certain dying declarations, was admitted to the force of full proof; and as the determining of a case upon the evidence of witnesses was left to the judges, very discriminating and nice distinctions were made in adjusting or weighing its relative force or value.[1]

When judgment was rendered against a defendant for a sum of money, time was given for payment, usually fourteen days, for the discharge of one half, and the remainder in a month. If, at the expiration of that time, he did not comply, application was made to the court, and the schout, or usually the court messenger, went to the delinquent, and exhibiting a copy of the sentence and his wand of office, which was a bunch of thorns, summoned him to make satisfaction in twenty four hours. If, at the expiration of that time, the amount was not paid, the delinquent was again summoned to pay within twenty four hours, which involved additional expense; and if, when that time expired, he was still in default, the messenger, in the presence of a schepen, took into custody the debtor's movable goods, which he detained for six

[1] Rec. of N. Y. Burg. and Schep. vii. viii. Myers' Institutions Judiciaries, chap. 14, 387. Van Leuwen, book v. chap. xiii. to xx. and xxiii.

days, within which time they might be redeemed on payment of the expenses. If they were not redeemed, notice was then given by publicly announcing upon a Sunday, and upon a law day, that they would be sold, and at the next law or market day they were disposed of by auction. If it was necessary to levy upon or sell real estate, or what in the civil law is termed immovable property, a longer term was allowed, and greater formalities were required. The manner of selling it was peculiar. The officer lighted a candle, and the bidding went on while it was burning, and he who had offered the most at the extinction of the candle, was declared the purchaser, which differed from the ordinary mode in a Dutch auction, where a public offer of the property is made at a price beyond its real value, which is gradually lowered or diminished until one of the company agrees to take it.[1]

The civil business of the court was large and varied; such as actions for the recovery of debts, which were generally cases of disputed accounts, or of misunderstanding between the parties, for in proof the probity and punctuality of the Dutch suits by creditors to enforce payments from delinquent debtors, formed but a small proportion in the general mass of this business. There were proceedings by attachments against the property of absconding debtors, or of non residents or foreigners, on which security was required of the debtor intending to depart, to release the property from the attachment; actions to recover the possession of land, or to settle boundaries, a proceeding somewhat similar to the relief afforded by our courts of equity upon a confusion of boundaries; actions to recover damages for injuries to land or to personal property, or to recover specific personal property as in replevin, or its value as in trover.

Actions for freight, for seamen's wages, for rent, for breach of promise of marriage, where the performance of the contract was enforced by imprisonment; for separation between man and wife, in which case the children were equally allotted to the parties, and the property divided,[2] after the payment of debts; proceedings in bastardy cases, in which the male was required to give security for the support of the child, and in which both delinquents might be punished by fine or imprisonment. Actions for assault and battery, and for defamation, which were *quasi* criminal proceedings, punishable by fine, imprisonment, or both, though the defamer was generally discharged upon making a solemn public recantation before the court, sometimes upon his knees, asking pardon of God and of the injured party. Pecuniary compensation, for injuries to person or character, could not be enforced; though cases occurred in which the defendant was discharged, it appearing that he had made compensation to the other party in money or goods. And, from the frequent application made to the court for redress in cases of defamation, detraction would seem to have been a vice to which the inhabitants were particularly prone.

The court, also, acted as a court of admiralty, and as a court of probate, in taking proofs of last wills and testaments, and in appointing curators to take charge of the estates of widows and orphans. Application was made to Stuyvesant for liberty to establish an orphan house, similar to the celebrated institutions which exist throughout Holland. He did not think that such an establishment was necessary, but he afterwards assented to the appointment of orphan masters, and those officers acted in aid of the court. Some of its proceedings in the exercise of this branch of its juris-

[1] Rec. of N. Y. Burg. and Schep. i. 204, 250; v. 207, 576. Van Leuwen, book 5, chap. 25.
[2] Rec. of N. Y. Burg. & Schep. iv. 1659. Rec. of Mayor's Court, i. 533.

diction, will serve to illustrate how tenaciously the Dutch clung to old forms or legal ceremonies, as, where a widow, to relieve herself from certain obligations, desired to renounce her husband's estate; it is, in all such cases, recorded, that the intestate's estate "has been kicked away by his wife with the foot," and that she has duly "laid the key on the coffin."[1] The court also exercised a peculiar jurisdiction, that of summoning parents or guardians before them, who, without sufficient cause, withheld their assent to the marriage of their children or wards, and of compelling them to give it.[2] It also granted passports to strangers, or conferred on them the burgher right, a distinction, which now, that it has ceased to be attended with any practical advantage, is still kept up in the custom of tendering or presenting the freedom of the city to strangers, as a mark of respect. It may not be uninteresting, moreover, to state, that the origin of a fee bill, for regulating, by a fixed and positive provision of law, the costs of attorneys and other public officers, is to be traced to Stuyvesant. On the 25th of January, 1658, he put forth what is known in Holland as a placard, that is, a proclamation, or ordinance, emanating from some legislative or executive authority, having the force of law, by which he established a regular tariff of fees. In England, the fees of attorneys and other officers of the court has always been regulated by the court, and not by any public act. In New-York, however, the fees of public officers has been a matter of statute regulation from a very early period. Ten or twelve years after the restoration of the province to the English, they were regulated by an ordinance of the governor, and afterwards by acts of the general assembly; and there is every reason to believe that the practice, especially as respects the fees of attorneys and officers of the court, was derived from the Dutch.[3] A copy of Stuyvesant's ordinance remains in the records of the burgomaster and schepens, and as the preamble to the document is of interest as a legal curiosity, we shall take the liberty to insert it. "Whereas, the director general and council of New Netherland, have sufficient evidence from their own experience, in certain bills of costs which have been exhibited to them, as well as by the remonstrances and complaints which have been presented to them by others, of the exactions of scriveners, notaries, clerks, and other licensed persons, in demanding and collecting from contending persons, excessively large fees, and money, for writing for almost all sorts of instruments, to the manifest, yea, insufferable expense of judgments and judicial costs; some of whom are led by their covetousness and avarice so far, as to be ashamed to make a bill or specify the fees they demand, but ask or extort a sum in gross. Therefore, to provide for the better and more easy administration of justice, the director general and council do enact," &c.; after which follows provisions requiring the licensing of the officer entitled to take the fees, the keeping of a record of all fees charged by them, and prohibiting champetry and other abuses. It is then provided, that the officers enumerated shall serve the poor gratis, for God's sake, but may take from the wealthy the fees specified. Each particular service is then enumerated in the manner of our former fee bills, with the number of stivers allowed for each. Among the provisions is the following entry: "No drinking, treats,

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[1] Rec. of N. Y. Burg. & Schep. ii., 323.

[2] Rec. of N. Y. Burg. and Schep. vols. 1, 2, 3, 4, 5, 6.

[3] Ordinance and Table of Fees in first edition of the Colonial Laws, by Bradford, 1694; Charter Book and Acts of Assembly of 1683, in office of Secretary of State; Laws of 1709, ordinance regulating fees.

presents, gifts or doucers shall be inserted in any bill, or demanded;" and the ordinance concludes by directing, that it shall be read once every year in the court, upon a day specified, to the officers enumerated, who were thereupon to be sworn faithfully to observe it; any officer being subject, for a violation of its provisions, to a fine of fifty guilders, or the loss of his office.[1]

In criminal cases, the schout prosecuted as plaintiff on behalf of the community. At his requisition, and upon the inspection by a magistrate of evidence sufficient to warrant a belief that an offence had been committed, the offender might be arrested or summoned according to the discretion of the magistrate; though where the culprit was detected in the actual perpetration of the deed, or where, in the judgment of the schout, there was strong ground of suspicion against him, and, in his opinion, the public interest demanded it, he might direct his immediate arrest; but in all such cases the schout was obliged to give notice of the arrest to the magistrate within twenty four hours, who was thereupon bound to investigate the matter—a provision that practically dispensed with the necessity of the writ of habeas corpus, so familiar in the history of the English law.[2] Bail was allowed, except in cases of murder, rape, arson or treason. There were two modes of trying the prisoner; either publicly upon general evidence, which was the ordinary mode, or by examining him secretly in the presence of two schepens, in which written interrogatories were propounded to the prisoner, to which he was obliged to return categorical answers. The Dutch law then adhering to the general policy of the civil law in respect to extorting confessions from offenders, and making use of the torture and of all those inquisitorial aids and appliances which have cast such a blemish upon the criminal jurisprudence of Europe.[3] The torture, however, was not used, except where the presumptive proof amounted almost to a certainty; and but one case has been found upon the records in which this cruel and unnecessary test was resorted to. Criminal prosecutions were not frequent, nor were the offences generally of a grave character. The punishments were by fine, which were distributed in three equal parts, to the schout, to the court and to the poor; by imprisonment, whipping, the pillory, banishment from the city or the province, or death, which, however, could not be inflicted without the concurrence of the governor and his council.[4]

Courts of the same popular character were established upon Long Island,[5] shortly after the erection of the one at New Amsterdam. A court with two schepens existed at Breuklin (*Brooklyn*) before 1654, which in that year was increased to four schepens. There was one at Midwout, (Flatbush,) with three schepens, and another at Amersfoort, (Flatlands.) David Provoost, who had been a notary at New Amsterdam, was made schout of Breuklin, and a district court was established, composed of the schout of Breuklin, and of delegates from these three tribunals, which was continued until 1661. In that year, similar courts were established at Boswyck, (Bushwick,) and at New Utrecht, and the whole were formed into a district known as "the five Dutch towns," to which there was attached one schout, residing at Breuklin, each town having its

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[1] Placards of Stuyvesant, in Rec. of N. Y. Burg. & Schep.

[2] Ordinances of Amsterdam, p. 46, and seq. Ed. of 1644.

[3] La Practique et encheridon des causes Criminills, Louvain, 1555. Van Leuwen, book 5, chaps. 27, 28.

[4] Rec. of N. Y. Burg. and Schep. iv. 141.

[5] 2 Thompson's History of Long Island, 96. 2 O'Call. 313, 323.

separate courts.[1] Courts were also established by virtue of a grant from Stuyvesant, among the English settlers at Canorasset, (Jamaica,) in 1656,[2] and at Middleburgh, (Newtown,) in 1659.[3] In 1652, Stuyvesant, by the simple exercise of his prerogative, established a court at Beverwyck, (Albany,) independent of the patroon's court of Raensellervyck.[4] It was held at the house of the vice director, upon the second floor, in a room directly under the roof, without a chimney, and to which access was had by a straight ladder, through a trap door.[5] The courts thus enumerated, including the patroon courts, already referred to, and the supreme or appellate court at New Amsterdam, composed of the governor and council, constituted the judicial tribunals of New Netherland, until the colony passed into the hands of the English.

That event took place on the 6th September, 1664.[6] By the terms of capitulation entered into between Col. Richard Nicolls and Stuyvesant, it was agreed that such of the inhabitants as desired might return to Holland, and that those who remained should continue to enjoy their own customs concerning their inheritances; that public records, except such as concerned the states general, should be carefully kept; that all contracts made before the signing of the articles should be determined according to the manner of the Dutch; that no judgment that had passed any judicature in the colony should thereafter be called in question, and that all inferior civil officers and magistrates should continue as they were until the customary time of new elections, when they should then have the choice of their successors, the new magistrates so chosen taking the oath of allegiance to the king of Great Britain.[7] Immediately upon assuming the government, as the representative of James, Duke of York, to whom the territory had been ceded by virtue of a grant or patent from Charles II., Nicolls changed its name, as well as that of the city, to New York, but abstained from any interference with the municipal government of the city, or with the administration of justice, until a later period.

He carried out the terms of capitulation that had been agreed upon, and adapted his measures so judiciously, that the municipal government of the burgomasters and schepens was resumed within a week, and the administration of justice was proceeded with as before. Upon resuming their duties, the burgomasters and schepens addressed a long letter to the directors of the West India Company, announcing the capitulation, and setting forth the reasons why they had deemed it best to continue under the rule of their conquerors. It was an affectionate and earnest epistle, addressed to the directors by "their honors' loyal, sorrowful and desolate subjects," concluding in these words: "Meanwhile, since we have no longer to depend upon your honors' power and protection, we, with all the poor sorrowing and abandoned commonalty here, must fly for refuge to the Almighty God, not doubting but that He will stand by us in this sorely afflicting conjunction. We remain your sorrowful and abandoned subjects. Done at Jorck, (*York*,) heretofore named Amsterdam, in New Netherland, 16th of Sept., 1664."[8] When the time arrived, in the February

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[1] Brodhead, 580.
[2] Thompson's History of Long Island, 96.
[3] Riker's Annals of Newtown.
[4] Albany Rec. 183. Records of Mortgages, Albany, book A. 2 O'Call. 183.
[5] 2 O'Call. 311.
[6] Brodhead, 762.
[7] 2 Rev. Laws, Appendix, No. 1.
[8] 5 Rec. of N. Y. Burg. and Schepens.

following, for choosing new magistrates, great reluctance was shown to take the oath of allegiance. Peter Tonneman, the schout, positively refused, and departed for Holland. Allard Anthony was chosen in his place, and he, with the other new magistrates, took the oath, though but one hundred and fifty of the inhabitants could be prevailed upon to do so.

James was no sooner apprised of the success of his expedition, than he applied to his father-in-law, Clarendon, then Lord Chancellor and first lord of the committee on foreign plantations, to draw up a body of laws for the government of his new territory. Clarendon accordingly prepared a code;[1] and this code or digest was transmitted to Nicolls, who immediately called a convention, formally to ratify and adopt it. This convention was held at Hempstead, Long Island, on the last day of February, 1665, or about five months after the capitulation of the province. It was composed of two delegates from each of the towns of Long Island, and from Westchester,[2] in all, thirty four members. The English had settled in parts of Westchester and Long Island, adopting, in many of their settlements, their own usages and customs. In the towns on Long Island associated with New England, the common law was in use, while in those near New York, the Dutch law prevailed.[3] It would seem, from the proclamation of Nicolls, as well as from the fact that no delegates were elected for or sent to represent the city of New York, that he intended that this code should merely go into operation in Long Island and Westchester, and should have no effect in New York and the Dutch settlements along the Hudson and at Albany. It was framed for the government of the whole province, but Nicolls, who was a judicious and sensible man, doubtless perceived how impossible it would be to bring it into operation among a people more than three fourths of whom were unable to speak the language of their rulers,[4] and who had lived for nearly half a century under municipal and judicial institutions derived from their mother country, with such changes and modifications as were adapted to their peculiar condition. The delegates met, and, after settling the boundaries of the several towns, the code, which was thereafter known as "the Duke's Laws," was publicly promulgated or ratified, and written copies of it distributed for the use of the towns. The convention merely adopted the code in the form in which they received it, for very soon after, Nicolls issued an order, wherein, after declaring that he had received information, that at the sitting of the convention divers inconveniences were found in par-

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[1] The writer is indebted to Dr. O'Callaghan for the first intimation of the fact that Clarendon was the author of this code. Many circumstances might be adduced, the result of a very full investigation of the subject, to show that he was author, but it is thought that it will be sufficient to insert the following note, received from Dr. O'Callaghan, with reference to certain documents:

Albany, 21*st Oct.*, 1854.

My Dear Sir,—Your favor of the 18th reached me yesterday, and I seize the earliest moment, to state, in reply to your inquiry, that in the course of my researches, preparatory to the publication of my 2d volume of the History of New Netherland, I came across the fact in some old record. It made a strong impression on my mind at the time, though I neglected to make a note of it, as it was posterior to the period to which my researches were limited. Should I again come across the old paper, I shall have much pleasure in informing you of the circumstance.

Believe me, &c., &c.,

E. B. O'Callaghan.

And see 3 Colonial Doc. relative to History of N. Y. 92, 104, 106, 114, 116.

[2] 1 Thompson's History of Long Island, 131.

[3] 1 Thompson's Long Island, 130.

[4] 3 Doc. relating to N. Y. Col. Hist. 114.

ticular laws embodied in the digest, and that other things needful to be inserted had been omitted, he had thought fit to make amendments and additions; and at the first setting of the court of assize, on the 28th of October following, nearly one hundred additional amendments were made, which were confirmed by James,[1] and material alterations were afterwards added in the years 1662, 1672, 1675. This code, as appears from entries upon copies now remaining, as well as from a statement of James,[2] was compiled from the laws then existing in the other colonies. It was based entirely upon the English constitution, with little or no reference to the mode of procedure, or of the laws which had been so long in use among the Dutch, an omission the more remarkable, as Clarendon had resided with Charles during his exile at the Hague, and could not have been insensible to many advantages in the Dutch judicial system. The only indication that he thought of it at all, was a provision that all small causes should be referred to arbitration, but it was so imperfectly framed, that it never had any practical effect. As a consequence of this neglect to adopt his code to the major part of the people it was intended to govern, it was many years before it came into full operation in the city of New York, or in the other parts of the province where the Dutch had colonized and settled.

As the judicial organization established by it is the important part of our inquiry, a very brief notice of its provisions, in other respects, is all that will be necessary.[3] It prohibited slavery, and established something like religious toleration, by enacting that no person who professed Christianity should be molested, fined or imprisoned, for differing in judgment in matters of religion; but decreed, that any one who should deny the true God or his attributes, should be put to death. No Indian was "to pow-wow or perform outward worship to the devil, within the government." No lands were to be purchased from Indians without the governor's leave. The sale of fire arms or strong liquor, to them, was prohibited, under heavy penalties. No one was authorized to trade with them without a license; and in the administration of justice, they were to have all the privileges enjoyed by the whites. It prescribed the mode for the government of townships, for collecting the revenue, for adjusting the boundaries of towns, and authorized the granting of new patents to all owners of land, and abolished many feudal incidents and tenures. It provided for the administration of the estates of intestates, and for an equitable division of the property among heirs. All conveyances, records of bargain and sale, and wills, and other instruments connected with the administration of estates, where the estate exceeded £100, were to be registered in the office of records, which was established in the city of New York. Special provisions were inserted for the regulation of innkeepers, even to the price of a meal, and for the regulation of attorneys, physicians, surgeons, midwives, and other pursuits, and for the care of cattle, and the adjustment of weights and measures. Any person bringing a vexatious suit, was to be amerced in treble damages. Ample provision was made for the general observance of religion, for the support of ministers, and the building of churches. Justices of the peace were allowed to marry, and a record was directed to be kept of births, marriages, deaths and burials. Some of the provisions in respect to the domestic relations were peculiar. A married person, absent in foreign parts over four years,

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[1] 1 Coll. of N. Y. Historical Society, 305. 3 Doc. relating to Col. Hist. of N. Y. 104.
[2] 3 Doc. rel. to N. Y. Col. Hist. 226.
[3] 1 Col. of N. Y. Historical Society, 305.

was presumed to be dead, and the other party might marry again; but if the absentee returned after five years, and could show that he had endeavored, by writing or by messages, to communicate that he was still living, or was "in imprisonment or bond slavery, with Turks or other heathen," he could, notwithstanding the second marriage, obtain an order for recohabitation; or if the parties to the original marriage consented to release each other, the second marriage remained valid, the husband by the first marriage having imposed upon him the charge of supporting the children by that marriage. The respect due to parents by children was enforced with a severity savoring of Chinese rigor. Any child, over sixteen years of age, of sufficient understanding, that should "smite" its father or mother, unless forced thereto in self preservation, was, upon the complaint of the father or mother, but not otherwise, to suffer death. The part of the code which related to the public defence, and the military organization of the colony, was the most minute in its provisions, and was evidently framed by an experienced military officer. In this the hand of James was apparent; for whatever may have been the faults of this prince, his admirable management of the English navy and dock yards, and his thorough supervision of the affairs of the colony of New York, prove him to have been a man of more than ordinary administrative capacity.

The judicial organization, established by the Duke's Laws, was as follows: Justices of the peace were commissioned for the various towns, who were clothed with all the powers exercised by such officers in England, and were allowed £20 a year for their services, which was afterwards limited to the payment of a specific sum for their attendance. A local court was created in each town for the trial of actions of debt or trespass, under five pounds. It was held once in every two, three or four weeks, as was found most convenient by the constable and overseers of the town, who were elected yearly by the freeholders. Six overseers, with the constable, or seven without him, constituted a quorum for the transaction of business; and when the court was assembled, all matters were determined by the vote of the majority. If the court were equally divided, the constable had the casting vote. In 1666, the number of overseers were reduced to four, and any two of them, with the constable, held the court. To this court a clerk was attached, known as the town clerk, and there was an appeal from its decisions to the court of sessions.

The province was divided into three ridings, known as the east, west and north riding, and in each a court of sessions was established, which was held twice a year, that is, on the first, second and third Wednesdays in March, and on the corresponding Wednesdays in June. The court of sessions was held by all the justices living within the riding. In the absence of a superior officer, such as a member of the provincial council, the members of which were all commissioned for the peace, the oldest justice presided as the chief officer, whose duty it was to instruct the jury as to the law, and to pronounce the "decree" or "sentence" of the court. All actions at law and all criminal cases, were tried before a jury. The jury were composed of the overseers of the different towns within the riding. Every town elected eight overseers, and an equal proportion from each town was returned by the sheriff to serve as jurors at the sessions. Seven jurors were empanneled for the trial of a cause, and the verdict of a majority was sufficient, except in capital cases, when the court might empannel twelve, which was uniformly done, and the twelve were required to be unanimous. This court had both civil and criminal jurisdiction. It had cognizance of all civil actions above five pounds; and there was no appeal from its judgment, except in cases of over twenty pounds. It was a court of probate, and

exercised the jurisdiction now entrusted to surrogates. It had, also, the power of granting a rehearing in any case, or, as it was called, a "review," and upon such review might, in its discretion, admit new evidence. From its judgments an appeal lay to the court of assize; and in cases not provided for by law, or to which no punishment was attached, it was required to remit the case to the court of assize, where judgment might be rendered and punishment inflicted according to the discretion of the court, provided it was not repugnant to the laws of England.

The principal or highest tribunal in the province was the court of assize, or, as it was sometimes called, the general assizes. It was held once a year in the city of New York, by the governor and his council, and such of the justices of the peace throughout the province as saw fit to attend it. It had original jurisdiction—civil, criminal and equitable—having cognizance of civil and equitable actions where the amount exceeded twenty pounds—and was the appellate court from all inferior jurisdiction. As in the court of sessions, causes were tried by a jury, which originally consisted of six, but was afterwards increased to twelve, and the trial by jury was not limited to cases originally brought into the court, but was extended to cases on appeal.

The annual setting of the court of assize was on the last Wednesday in October; but for the hearing of cases that required speedy despatch, a session of the court might be called at any time by a special warrant from the governor. The governor and council were also empowered to issue a commission for a court of oyer and terminer, where it was certified to them from the court of sessions that a capital offence had been committed, and that more than two months would elapse before the sitting of the court of assize. But courts of oyer and terminer would seem to have been unfrequent, but two instances of the setting of such a court having been found upon the records.[1] When called, the judges who were to hold it, were named in the commission.[2]

It was the design of Clarendon that the court of assize should be nothing more than a judicial tribunal, but it became in time a kind of colonial legislature. When the convention was called at Hempstead, it was generally expected, especially among the English residents of Long Island, that a representative assembly would be convened similar to those which existed in New England, and that it would be continued annually thereafter. But there was no provision for a provincial assembly

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[1] Rec. of Wills, N. Y. Surrogate's Office, vol. i. 1 Smith, 41.

[2] In Smith's History, it is stated that Nicolls erected no court of justice, but took upon himself the sole decision of all controversies; that complaints came before him upon petition, upon which he gave a day to the parties, and after a summary hearing, pronounced judgment; that his determinations were called edicts, and were executed by the sheriffs he had appointed. He further says, when speaking of the administration of Nicolls' successor, Governor Lovelace, that Lovelace, "instead of taking upon himself the sole determination of judicial controversies, after the example of his predecessor, called to his assistance a few justices of the peace, and this, which was called the court of assize, was the principal law judicatory in these times." For this statement, there is not the slightest foundation, further than that appeals to the court of assize came up in the form of a petition to the governor and council; and that in one instance Nicolls issued a special commission for the investigation of the causes of the riots at Esopus, (Kingston,) and of the trial of the rioters by the commissions in conformity to instructions which he framed and transmitted. On the contrary, it appears by the records of the court of assize, which are still extant, from the year 1665 to 1672, that the court was duly convened by Nicolls, at New York, upon the day appointed for its first sitting by the Duke's Laws, Sept. 28, 1665, and that the first cause before it was tried by a jury. 3 Doc. rel. to N. Y. Col. History, 149. Rec. of Court of Assize, 14.

in the duke's laws; nor was it the intention of James that any such privilege should be granted.[1] When the delegates met at Hempstead they were, no doubt, apprised of what was expected from them, and after fixing the boundaries of the towns, and formally ratifying the duke's laws, they took no further action, but wound up their labors with an address filled with expressions of unbounded loyalty to James, and of cheerful submission to all such laws as he had enacted, or might thereafter enact.[2] The whole conduct of the convention, and the servile character of this address, gave rise to loud complaints. The inhabitants, particularly those of English origin, regarded the result of the convention as equivaleut to the surrender of their right to a legislative assembly; and finding that such a distinction was to be made between them and their New England brethren, their censure of the delegates was open and general. In fact, it was so freely indulged in, and so long continued, that the court of assize, some eighteen months after, passed a resolution, threatening with a public prosecution any one who should speak against the signers of the address. When it became apparent, therefore, that all hope of a representative assembly was cut off, the desire for popular representation began to show itself in the court of assize. It had something of a popular element in the numerous justices of the peace who were privileged to attend it. As early as 1666, petitions came before it for the redress of grievances, and the enactment of necessary laws; and Nicolls, who was a man of moderation, and disposed to adapt the government to the wishes and wants of the people, made no opposition to the members of the court deliberating upon matters affecting the general welfare of the province. Under Lovelace, this assumption of legislative powers became more decided, and justices of the peace attended its sittings even from so remote a part of the province as Delaware.[3]

It was determined that each member of the court was entitled to vote; that the voice of the majority should control; and at each annual sitting, measures of a strictly legislative character were adopted, which were not formally enacted as laws, but put forth for the government of the province, in the shape of general orders. This exercise of legislative powers did not interfere with its judicial functions. It still continued to be the highest judicial tribunal, but this branch of its business was mainly limited to cases upon appeal.

After the passage of the duke's laws, no action was taken respecting the city of New York, until the 12th of June, 1665. During the ten months that had intervened since the capitulation, the court of burgomaster and schepens had continued in the exercise of its municipal and judicial functions; but on that day, Nicolls published a proclamation, abolishing the form of government established by the Dutch, and declaring that, "For the future government of the city, persons should be commissioned to put the laws in execution, in whose prudence ability and good affection to the government of England, he might have reason to put confidence;" which persons, he declared, "should be known thereafter as the mayor, aldermen and sheriff, according to the custom of the corporations in England." Upon the same day, a joint commission was granted, appointing Thomas Willett, mayor; Thomas Delavall, Oloff Stuyvesant, John Bruggs, Cornelius Van Ruyven and John Lawrence, aldermen; and Allard Anthony, the existing schout, sheriff;[4] and these officers were declared to be

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[1] 3 Doc. rel. to N. Y. Col. Hist. 230.

[2] See 1 Thompson's Long Island, 133, in which this address is printed at length.

[3] Rec. of Court of Assize.

[4] Doc. Hist. of N. Y. 389.

a body politic and corporate thereafter, with power to govern the city according to the laws then existing, or which might thereafter be enacted. These magistrates assembled on the 15th of June following. They reappointed the former clerk of the court of burgomaster and schepens; changed the name of the court to the mayor's court—a title by which it was known for one hundred and fifty-six years afterwards—and, after making a few minor appointments, and transacting some further business, adjourned. They met again on the 27th of June, for the hearing and trial of causes. The records were directed to be kept in English and Dutch, and a jury of twelve were empanneled for the trial of a civil cause;[1] but, with this exception, the business was conducted precisely as before. The change was, in fact, more formal than real. It was merely altering the burgomaster into a mayor, the schepen into an alderman, and the schout into a sheriff. In bringing about the change, Nicolls evinced his usual good sense and judgment. Willett, who was sent for from Plymouth, for the purpose of making him mayor, was an Englishman, but thoroughly conversant with the Dutch language. He had been employed by Stuyvesant in important negotiations; had been engaged in trade with New Amsterdam as early as 1645; and was well acquainted with the people, and with their usages and customs. The majority of the aldermen, moreover, were selected from the Dutch inhabitants, and the two of English birth, Delavall and Lawrence, had long been residents of New Amsterdam, and spoke the language. By this selection, and by appointing the former schout to the office of sheriff, there was little in the new organization to make the inhabitants feel that any sensible change had taken place. It was ordered that jury trials should be held on the first Tuesday of every month; but the institution found little favor with the Dutch—the great majority of suitors preferring to have their cases summarily disposed of by the judges, in the manner to which they had been accustomed—and trials by jury did not come into general use in the court until many years afterwards.

Willett bore a high character for firmness and integrity, and was an able and efficient magistrate. With the exception of introducing the trial by jury, he adhered to the practice and form of procedure that had been established by his Dutch predecessors; and, though the duke's laws were as binding upon the mayor's court as upon any other court in the province, no attention appears to have been paid to them. During the whole period of Nicolls' and Lovelace's government, justice was administered according to the Dutch law; and for half a century afterwards, many of the principles and forms of procedure peculiar to that law, continued to be recognized and followed in the court.[2]

In 1665, the court of burgomaster and schepens, at Harlæm, was abolished, and a town court, under the duke's laws, substituted in its stead; and, in the same year, Nicolls entered an order in council, not then designed to be made public, by which the property of the Dutch inhabitants, who had not then taken the oath of allegiance, was declared to be forfeited to the crown.[3] Willett continued as mayor for three years. His two successors, Delavall and Steenwyck, were appointed by the governor; but, in 1669, the old Dutch form of nominating a double set of magistrates was resumed. The magistrates then in office nominated to the governor two persons for

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[1] 1 Rec. of Mayor's Court, 1, 9, 26.

[2] Records of Mayor's Court, vols. i. ii.

[3] 1 Rec. of Wills, N. Y. Surrogate's office, in which this decree will be found at length.

each office, from whom Lovelace selected those who were to serve for the next two years. In 1670, the period of service was reduced to one year; after which, the magistrates who were to serve for the coming year were nominated and selected by the governor; and this mode of appointing them annually continued until Dongan's charter was granted, fifteen years afterwards. In 1669, James presented the mayor with a silver mace, and each of the aldermen with gowns; and, in 1671, the English practice of requiring a proclamation of the bans of marriage having been adopted, a formal registry of them was kept in the mayor's court.

There was no court of chancery, but matters in equity were heard in any of the courts organized in conformity to the duke's laws. The equitable jurisdiction of the town court was limited to five pounds, but in the court of sessions there was no limitation. Proceedings in equity were conducted by bill and answer; witnesses were examined in the same manner as was customary at the period in the court of chancery in England, and all suits in equity were determined by the court, without the intervention of a jury. This mode of administering legal and equitable relief in one and the same tribunal, continued for many years, even after the establishment of a court of chancery, in 1683, and it is curious to note that we have returned to it again, after the existence of a distinct court of equity in the state for nearly a century and a half. It is also worthy of notice, that the right of a court of equity to dissolve the marriage contract upon the ground of adultery, a jurisdiction not assumed by the court of chancery in England,[1] was recognized in this state, at this early period. In 1671, a suit was brought for divorce, for the adultery of the wife, but the court held that it had no power to grant one. An application was then made to Governor Lovelace, and he decreed in council that it was conformable to the laws of the colony, to the civil law, and not inconsistent with the laws of England, that the marriage should be dissolved upon proof of the wife's adultery, and he sent the case back to the court to take proof of the adultery.[2] Chancellor Kent says, that no divorce took place in the colony of New York for more than one hundred years before the revolution; and that after it became a state, there was no lawful mode of dissolving a marriage in the lifetime of the parties, but by a special act of the legislature, until by the act of 1787, the power was conferred upon the court of chancery, to grant divorces *a vinculo* in cases of adultery.[3] The Dutch law allowed a divorce for adultery,[4] and such divorces had been granted by the court of burgomasters and schepens. Of this, doubtless, Lovelace was advised, when he declared it to be the law of the colony, but it would seem that after the court of chancery was created, and the English system was fully established, that divorces for this cause was no longer granted in the colony.

On the 9th of August, 1673, the city was retaken by the Dutch, after it had been in the possession of the English for nine years. Anthony Colve was appointed governor, the old name of the province was restored, and the name of the city was changed to New Orange. At a council of war, held by the commanders of the Dutch expedition, the former municipal government of schout, burgomaster and schepens was re-established, the burgomasters being increased to three, and the schepens to six, and

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[1] Dow's Rep. 117. Bisbop on Marriage and Divorce, § 278.
[2] 1 Dunlap, App. cxviii.
[3] 2 Kent's Com. 97.
[4] Vander Linden's Institutes of Holland, 88. Van Leuwen, 484.

Colve made some alterations in the organization of the court, none of them, however, of sufficient importance to be enumerated.[1] But this change lasted but little over a year. By the treaty signed at London, the states general relinquished the province of New Netherland to the English, and on the 31st of October, 1674, it was formally surrendered by Colve to Sir Edmund Andros, as the representative of James, Duke of York.[2]

In the instructions given by James, upon the departure of Andros, he was directed to see that justice was administered with all possible equality, without regarding as to their private concerns, whether the parties were Dutch or English. "It being my desire," said James, "that such as live under your government may have as much satisfaction as possible, and that without the least appearance of partiality, they may see their just rights preserved to them inviolably." Andros was instructed to put into execution the laws, rules and ordinances which had been established by Nicolls and Lovelace, and not to vary from them except upon "emergent necessity," nor then, unless upon the advice of his council and of the "gravest and most experienced persons" in the colony. The choice of magistrates and officers of justice was left to his discretion, except that he was required to select those of "the most reputation for ability and integrity, who, for those reasons, might be most acceptable to the inhabitants."[3] Upon taking possession, Andros changed the name of the city and the province again to New York, and ordered that the English form of government, as it had previously existed under the title of mayor, aldermen and sheriff, should be restored, and that all magistrates who were in office when the Dutch took possession, should resume their duties, and continue in office for six months thereafter.[4] The mayor's court was accordingly convened on the 13th of November following. Col. Matthias Nicolls, who had formerly been mayor, resuming the duties of that office, with four aldermen, John Lawrence, William Duvall, Gabriel Minviele, Frederick Philippse, two of whom had formerly served in that capacity. An order was made, that the records should thereafter be kept in English, and that all papers submitted to the court should be in that language, except in the case of poor people, who could not pay for a translation.[5]

On the 6th of August, 1674, James transmitted to Andros a copy of the laws in force under Nicolls and Lovelace, digested in one volume, accompanied by an order requiring him to put them in execution, except "such as might be found inconvenient," with power to make alterations and amendments, subject to James' approval.[6] Upon receiving this order, Andros published a proclamation, declaring that the "Book of Laws" should be in force thereafter; that the courts created by these laws should be held at the times and in the manner pointed out by them, and that all civil magistrates should be chosen thereafter in conformity with them. By this proclamation all the former courts were revived. The towns courts were re-established, and the courts of sessions, of which there were three, two upon Long Island, and one at Esopus, (Kingston.) A court of sessions was established at

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[1] 1 Doc. History of N. Y. 390 to 395, where these alterations will be found.
[2] 1 Dunlap, 129. N. Y. Rec. of Burg. and Schepens, vol. vi.
[3] 3 Col. Doc. 217.
[4] Mayor's Court Rec. vol. iii. 1 Smith, 130.
[5] 2 Mayor's Court Rec.
[6] 3 Col. Doc. 226.

Albany, under Nicolls, in 1666; this also appears to have been revived by Andros, and afterwards took the name of the mayor's court. Within two months after Andros put forth his proclamation, the court of assize was held in the city of New York, upon the regular day fixed by the duke's laws, and from entries of appeals, made to it from inferior courts, it would seem to have been held regularly every year, for ten years thereafter, with but one or two exceptions, though no regular records of the court could be found, after a diligent search in the public offices at New York and Albany. In addition to the members who formerly composed it, the mayor, recorder and aldermen of New York sat, by virtue of their authority, as justices of the peace; and at the session held at New York in October, 1680, twenty-nine members were present, and took part in its proceedings. Andros, who was a good lawyer, was, no doubt, the most active and efficient judicial member of the court.[1] It continued, as before, to exercise legislative functions. Indeed, the right of its members to act as legislators was recognized by James, for when advised by Andros, shortly after his arrival, of the general wish for a provincial assembly, he replied, that the redress of any grievance might easily be obtained by a petition to the general assizes, "where," said he, "the same persons (as justices) are usually present, who, in all probability, would be their representatives, if a different constitution were allowed."[2] He could see no use, he said in another letter, in such assemblies;[3] but at the same time, he was watchful to see that justice was carefully and humanely administered. "It is not unseasonable," wrote Sir John Werdon to Andros, "though it may be unnecessary, to put you in mind that it is his royal highness' intention to have all persons treated with all humanity and gentleness that can consist with the honor and safety of your government, to the end, that where the laws do inflict a punishment, it may seem rather for example to deter others from the like crimes, than to afflict the party punished, except where his malice appears plainly to aggravate his offence."[4]

The establishment of the code, as the general law of the province, produced no material change in the mayor's court, though some approximation was made to the English mode of proceeding. Nicolls, like the former mayor, Willett, had been long a resident in New Amsterdam, and the twelve mayors that succeeded him, with two exceptions, were of Dutch origin, or had been residents of New Amsterdam, under the Dutch. The provision requiring all papers before the court to be in the English language, introduced something of the English form of pleading, but it was so blended with the Dutch mode as to be scarcely distinguishable; and it was not until after the arrival of one or two English lawyers, about 1682, that special pleading came at all into use. In fact, the English forms of procedure and mode of practice were not brought into general use in the colony until the time of Chief Justice Mompesson, that is, between 1704 and 1718.[5] Nicolls, and the aldermen associated with him, continued in office until October, 1675, when Andros granted a commission, or rather charter, formally reinstating the corporate government of the city, increasing the number of aldermen to six, and conferring upon the corporation "full power and

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[1] 1 Chambers' Introduction to Revolt of North American Colonies, 144. 3 Col. Doc. 231, 287, 288. 2 Bancroft, 428.

[2] 3 Col. Doc. 230.

[3] 3 Col. Doc. 235.

[4] 3 Col. Doc. 237.

[5] Field's Provincial Court of New Jersey, 56.

authority to keep courts, administer justice, and rule and govern the inhabitants, according to the laws of the province, and the privileges and practices of the city."[1] The mayor, with any four aldermen, were authorized to sit as a court of sessions, but they did not organize any separate criminal tribunal, but continued, as before, to discharge criminal, civil and municipal business at the regular sitting of the court, which was fixed for every three weeks; and an order was made that all causes should be tried before a jury, though it was not strictly adhered to. The most beneficial features of the Dutch court of referring causes to arbitrators, was continued and practised very generally, until English lawyers began to increase in the colony, when the system of special pleading grew more refined and subtle, and arbitrations were no longer resorted to, except in cases of accounts, which were usually referred to three persons, at first styled arbitrators, and afterwards referees; and all cases of accounts continued to be so referred until 1772, when the practice was permanently fixed and regulated by statute.[2]

In 1678, James authorized Andros to erect a court of admiralty. No regular tribunal was established, but in one or two instances Andros issued special commissions for the trial of admiralty causes; and in other cases the hearing and determination of matters in admiralty was left to the mayor's court.[3]

In 1682, Dongan was appointed governor. Through the advice of William Penn, and in consequence of requests made to him by men of every rank in the province, James yielded to the general wish for a representative assembly,[4] and authorized Dongan to call one,[5] and immediately after his arrival, a general assembly was convened. Though the power to create courts was vested in the new governor, by his commission and instructions, he appears to have left the matter entirely to the assembly. That body met in October, 1683, and after passing a charter of liberties and privileges, and dividing the province into twelve counties, they passed an act to "settle courts of justice."[6] This act created four distinct tribunals—a petty court, for the trial of small causes for every town—a court of sessions for each county—a court of oyer and terminer, or general good delivery—and a court of chancery for the province at large.

The town court was held on the first Wednesday of every month, by three persons commissioned by the governor, without a jury, and had cognizance of action of debt and trespass when the amount did not exceed forty shillings. The court of sessions was held by three justices of the peace, twice a year, in each county, except, that in the county of Albany it was held three times, and in the city and county of New York, four times a year. In the city of New York it was held by the mayor and four aldermen. Like the former court of sessions, it had both civil and criminal jurisdiction, without any limitation as to amount; and all causes before it were tried by a jury. There was attached to it a clerk, known as the clerk of the sessions, a marshall and a crier. The court of oyer and terminer was composed of two judges, commissioned by the governor, each of whom held a circuit of the court in every

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1 2 Rec. of Mayor's Court.
2 Rec. of Mayors, vols. ii. to vii. Laws of 1772 and 1781.
3 3 Col. Doc. 260. Rec. of Mayor's Court, vols. ii. and iii.
4 1 Chalmers' Introduction to Revolt of North American Colonies, 145. 1 Dunlap, 134.
5 3 Col. Doc. 331, 333.
6 2 Rev. Laws, Appendix. Mans. Laws of 1683, in N. Y. State Library.

county in the province twice a year, having associated with him four of the justices of the peace of the county, and in the city of New York, the mayor, recorder and four aldermen. The oyer and terminer had general jurisdiction in cases civil and criminal, triable at the common law, and was the general appellate court. The court of chancery was held by the governor or council, with power in the governor to appoint a chancellor to act in his stead. It had jurisdiction of all matters in equity, and was declared to be the supreme or highest court in the province. Immediately after the passage of this act, Governor Dongan appointed, as judges of the court of oyer and terminer, Matthias Nicolls, before referred to as mayor of the city of New York, and Thomas Palmer, both of whom were lawyers by profession; and commissioners were appointed for the various town courts, additional justices of the peace created, and sheriffs and other officers commissioned.[1] In the following year, 1684, the court of assize was abolished by an act of the general assembly, and in the same year, Thomas Rudyard, an eminent London lawyer, who had come out in 1682, as deputy governor of New Jersey, was appointed by Dongan to the office of attorney general.[2]

Upon Dongan's arrival in the city of New York, he dismissed all the old magistrates, and appointed new ones. The November following his arrival, the mayor and aldermen presented a petition, asking a confirmation of their franchises and privileges, and among other things, that the city should be divided into six wards, that the freeholders of each ward should have power to elect an alderman and a common council man, with other local officers; and that a recorder might be appointed by the governor, to aid and assist the mayor.[3] This petition Dongan transmitted to James, but he complied with the request for the division of the city into wards, and for the appointment of a recorder.[4] On the 14th of January, 1684, he issued a commission, appointing James Graham to the office—an office which he continued to fill, with but one interruption, for seventeen years afterwards.[5] On the day following Graham's appointment, all the new magistrates went in a body to the fort, and being sworn in before the governor and council, returned and opened court; "the recorder," says the record, "taking his seat on y^e^ right hand of y^e^ mayor."

The general assembly convened by Dongan had power to pass laws, subject to the approval of the governor and the duke. Dongan approved the laws enacted at the two sessions of 1683 and 1684, and transmitted them to England; but before any action was taken upon them, James had ascended the throne. He was highly displeased with the conduct of the general assembly in passing a charter of liberties and privileges; the matter was taken up in council, and this charter rejected, but the other laws were approved.[6] The passage of this charter was enough for James. He resolved that there should be no more representative assemblies, and accordingly a new commission was issued to Dongan, in 1686, by which all legislative power was exclusively vested thereafter in the governor and his council, subject to the approval of the king and privy council. By this commission, Dongan was specially empowered to erect courts of law or equity, if necessary, and to appoint judges,

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[1] N. Y. Colonial Mans. vol. xxiv.

[2] He was succeeded in 1685 by James Graham, Recorder of New York, who appears to have been succeeded by James Emot, a prominent lawyer in the colony.

[3] London Doc. New York Papers, i. 177. 2 Dunlap, App. cxxx.

[4] 3 Col. Doc. 339, 340.

[5] N. Y. Col. Mans. vol. xxxiii.

[6] 3 Col. Doc. 257, 370.

justices of the peace or other officers; and in the instructions accompanying the commission, he was directed "always to take care that they (the judges) be men of estate and ability, and not necessitous people, or much in debt, and not to displace judges, justices or sheriffs, without good and sufficient cause, to be signified to the king; and to prevent their arbitrary removal, that no time should be expressed in the commission for the duration of their offices."[1]

The act "to settle courts of justice" having been approved by the king, the courts established by it were continued regularly thereafter, the only change Dongan made, being to create what he called "a court of judicature," but which was, in fact, a court of exchequer. Having found great difficulty in enforcing the payment of the king's revenues, from the imperfect organization of distant courts, and the intractability of country jurors, he created this court, which was held by the governor and council, on the first Monday of every month, for the determination of suits or matters arising between the king and the inhabitants, concerning lands, rents, rights, profits and revenues.[2] He also held, together with his council, a court of chancery. The first court of chancery was held on the 16th of February, 1683, immediately after the passage of the act to settle courts of justice, and it was directed to be held thereafter on the first Thursday of every second month, or six times a year.[3] By the new commission, sent out to him, it was provided that appeals should be allowed in cases of error from any of the courts to the governor and council, where the amount involved exceeded £100, with a right to appeal from the decision of this tribunal to the king and privy council, where the amount exceeded £300. The judicial powers, therefore, of the governor and council, were threefold. They had general jurisdiction in all matters in equity, sat as a court of exchequer, and constituted the final court of appeal of the province. There was also, at this period, 1686, a mayor's court, at Albany, which sat every fortnight, from which, as from the mayor's court at New York, an appeal might be brought in cases above £20.[4] A special commission was always issued for holding each court of oyer and terminer, and the particular judge who was to hold it, with the justices of the peace who were to be associated with him, were named in the commission. At the close of the circuit or term, the written pleadings in each case, with all orders made, records of judgment, in short, everything that took place before it, and that had been reduced to writing, was tacked to the commission, and enclosed to the secretary of the province, and placed on file as the official record. Of the two regular judges, Nicolls and Palmer, Dongan spoke in the highest terms. In a report made by him, on the state of the province in 1686, he says, "their management has been such by arbitration, and such other mild courses, that where there were ten actions formerly, there is not one now." It was before this court that Leisler was tried for alleged treason and rebellion in usurping the government, but by judges specially appointed. It continued in existence for eleven years.

In the same year that Dongan received this new commission, he granted to the city of New York the well known charter that bears his name.[5] By this charter

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[1] 3 Col. Doc. 369.
[2] 3 Col. Doc. 390.
[3] N. Y. Col. Mans. Council Minutes, vol. v. p. 48.
[4] 3 Col. Doc. 379, 390.
[5] Kent's Charter and note, 41—209.

it was provided that the inhabitants of each ward in the city should elect annually one alderman, one assistant alderman, and one constable; and that the mayor, recorder and sheriff should be appointed by the governor and council, and the high constable by the mayor. The mayor, recorder, and any three or more of the aldermen, with any three or more of the assistants, were created a *common council*, which, when duly convened, was authorized to pass laws and ordinances for the government of the city. The mayor, recorder and aldermen, or any three of them, of whom the mayor or recorder were required to be one, were authorized to hold within the city, a *court of common pleas*, upon every Tuesday, for the trial of all actions of debt, trespass, or trespass upon the case, detinue, ejectment, or other personal action, according to the rules of the common law and the acts of the general assembly of the province; and it was provided that the mayor or recorder, or three or more of the aldermen, not exceeding five, should be justices of the peace, and any three, of whom the mayor or recorder were required to be one, were empowered "to hear and determine all manner of petty larcenies, riots, routs, oppression and extortions, and other trespasses and offences in the city."

Up to the time of granting this charter, there was united in the mayor's court, as had formerly been the case under the Dutch, the twofold function of a council or board, for the regulation of the municipal affairs of the city, and of a court of justice. Matters, whether legislative or judicial, came before the same body, and no distinction was made, except that it was usual, after the business of the court was gone through with, to attend to municipal affairs. By the charter, however, a separation was made between the legislative and judicial functions of the mayor, recorder and aldermen, and as respects their judicial powers, there was a further separation between the powers they possessed, as criminal magistrates, and those which they exercised as judges in civil cases. Three tribunals were accordingly organized, each composed of the same persons, but each tribunal having duties assigned to it wholly distinct and different from the others. These were the common council, the mayor's court, for though called in the charter the court of common pleas, it still retained its former title, and the sessions. In the common council was vested exclusively the power of passing laws and ordinances for the government of the city. The mayor's court was for the trial of civil actions only, and under the provisions of the charter authorizing the mayor, recorder and aldermen to try criminal offences, a criminal tribunal was organized, at first denominated the quarter sessions, and after 1688, the court of sessions.[1] As has been previously stated, a court of sessions was established in the city by the act to settle courts of justice, which, like the same courts in the other counties, had both civil and criminal jurisdiction. It was in view of the establishment of this additional court in the city, and from the desire to have a permanent law officer attached to the corporation, who should not go out upon the annual change of magistrates, that the mayor and aldermen applied to Dongan, in 1683, to appoint a recorder. Immediately after the appointment of Graham, this court was organized by the mayor, recorder and aldermen, the recorder presiding as the chief officer, and as it sat but once every three months, while the mayor's court sat every two or three weeks, it was deemed a court of a higher grade, in which at first,

[1] Rec. of N. Y. Quarter Sessions, vol. i. Rec. of N. Y. Court of Sessions, 1688.

the more important civil actions were brought, and the principal criminal offences tried. It continued in existence three years, but by that time it was apparent that the mayor's court and the oyer and terminer was sufficient for the dispatch of the legal business of the city. The circuit of the oyer and terminer was held in the city twice a year, and as the mayor's court had equal jurisdiction with the court of sessions, with the advantage of sitting more frequently, there was comparatively little for the court of sessions to do. It was not, therefore, embraced in the general provision made by the charter, nor yet was it repealed. The act creating it had been passed by the general assembly, had been signed by Dongan before he granted the charter, and subsequently ratified by James. It was not, consequently, in Dongan's power to repeal it, but with the general acquiescence of all parties, the court seems to have been dropped, and the quarter sessions, as a court of exclusive criminal jurisdiction, substituted in its stead.

In 1688, Dongan, the most independent and liberal minded of all our governors, was recalled, and lieutenant governor Nicholson left in charge of the province. At the close of the same year, William Prince of Orange landed in England, James abandoned his throne, and the government of William and Mary was established. When the news of this event reached New York, the populace, apprehensive that the lieutenant governor and his council were unfriendly to the Prince of Orange, and excited by a rumor that Nicholson designed to massacre the Protestants, and declare for James, armed themselves, and under the direction of Jacob Leisler, took possession of the government by force, and Leisler, after organizing a council, and proclaiming William and Mary, held the province, and administered its affairs until the arrival of Governor Sloughter, in 1691. During the twenty one months of Leisler's administration he issued several commissions for courts of oyer and terminer at New York, and upon Long Island, and appointed Peter De Lanoy a member of his council and the mayor of the city, chief judge of the oyer and terminer.[1] The adherents of William and Mary were divided into two factions—the Dutch and French party—headed by Leisler and the English Episcopalians, known as the anti Presbyterian party, in which were included all who had been in power under Dongan or Nicholson; and the latter having secured the confidence of Sloughter, Leisler and Milbourne, his son-in-law and chief adviser, were brought to trial before a special court of oyer and terminer, for alleged usurpation of the government, convicted and executed.[2]

By his commission from William and Mary, Sloughter was authorized to convene a representative assembly, which he accordingly did, and this body met in the beginning of 1691. They do not appear to have understood the precise effect of the act of settlement, even if they were at that time informed of its adoption;[3] and being, moreover, under the erroneous impression that none of the acts of the general assembly of 1683 and 1684 had been affirmed by James, and were therefore null and void, they passed an act for the general judicial re-organization of the province.[4] This act changed the

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[1] 2 Doc. Hist. of N. Y. 36, 164.

[2] Papers in 2 Doc. Hist. of N.Y. from page 3 to 250. 1 Dunlap, 150 to 211. 1 Smith, 90 to 111.

[3] Hume, chap. lxxi. Journals of Assembly of 1691.

[4] This act will be found in the first edition of the colonial laws, printed by Bradford, in 1694; the only perfect copy of which now supposed to exist is in the library of a private gentleman in New York. It has also been reprinted in the appendix to 2 Paine and Duer's Practice, 715.

town courts into courts of justices of the peace, created a court of common pleas for each county, except the counties of New York and Albany, to be held by a judge commissioned by the governor, and courts of general sessions of the peace for each of the counties, and made the same provision for a court of chancery, which had been made by the act of 1683. But the most important feature in this act was the creation of the present supreme court. It declared that a supreme court of judicature should be established in the city of New York, to be composed of a chief justice and four assistant justices, to be appointed by the governor, and that it should have cognizance of all actions, civil, criminal or mixed, as fully and amply as the courts of king's bench, common pleas or exchequer in England, and should have power to establish rules and ordinances, and to regulate the practice of the court. By this act, courts of general sessions of the peace were organized as criminal tribunals, distinct and separate from the courts of common pleas, which were courts for the trial of civil actions only. In all the counties, except New York and Albany, the courts of general sessions of the peace were held twice a year; in Albany three times a year; and the court of sessions in the city of New York was held four times a year. The civil jurisdiction of the court of common pleas was essentially the same as that of the former court of sessions; and the term of the court began on the day after the sitting of the general sessions—the terms of both courts being limited to two days each. By this act, the court of oyer and terminer was abolished; but in conformity to the organization of the courts of Westminster, its name was retained, to designate the criminal circuit of the supreme court.

Immediately upon the passage of this act, the supreme court was organized, and Joseph Dudley appointed chief justice,[1] Thomas Johnson second judge, and William Smith, Stephen Van Cortland and William Pinthorne, associate justices. Thomas

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[1] Joseph Dudley, the first chief justice of the state, was the son of Governor Dudley of Massachusetts. He was born in 1647, and graduated at Harvard. Having been designed by his parents for the ministry, he studied divinity, but the limited sphere and unostentatious life of a New England clergyman, at that period, presented no attraction to a man of his worldly views and ambition. He accordingly gave up divinity, entered into political life, and was shortly after elected a delegate from Roxbury. In 1682, he was the agent of the colony of Massachusetts, in England, and upon the union of Massachusetts and New Hampshire under one government, in 1685, he returned to Boston, and was made, under Andros, president of the governor's council; at which period he is enumerated by Dongan, as among a very few who might be relied upon as loyal and well affected to the king. Throughout the administration of Andros, he supported all the measures of that unpopular governor; and as he presided as judge upon political trials, was especially serviceable in enforcing the despotic colonial policy of James. When the people of Boston rose against the government of Andros, upon receiving intelligence of the revolution in England, of 1688, and of the declaration of the Prince of Orange, Dudley, with other obnoxious persons, was thrown into prison. To a more scrupulous or less indefatigable man, the downfall of James, and the part he had played under his government, would have cut off all hopes of immediate advancement; but Dudley was no sooner released from prison, than he went to England, and ingratiated himself so fully into the favor of the new ministry, that in little more than a year he received an appointment as a member of the council for New York, with the promise of a judicial station when the government of Sloughter should be fully established. Upon his arrival in New York, at the close of 1690, he at once joined the anti Leislerian party, and upon the arrival of Governor Sloughter, in 1691, he was placed at the head of the special commission of the oyer and terminer, for the trial of Leisler, which he conducted as chief, or principal judge. After the passage of the act above referred to, he was appointed chief justice; but the Leislerian party having obtained the mastery in 1692, he left the province, and was shortly thereafter removed by Governor Fletcher from the office of chief justice, and Chief Justice Smith appointed in his place. This second reverse of

Newton was appointed attorney general, but he held but for a month, and was succeeded by James Graham, recorder of New York, who had previously filled the office.[1]

This act took effect but for two years; but in the following session of the general assembly, in 1692, an act was passed renewing it for one year longer, with an additional provision, that the supreme court should sit twice every year in the city of New York, on the first Tuesdays of April and October, and continue in session five days; and that one of the justices of the court should annually go the circuit, and hold a court at least once a year, if need should require, in the other counties.[2]

As thus organized, with a fixed tribunal established at New York, and an annual circuit made by one of the justices through the other counties, the court was continued by successive re-enactments of one or two years each, until 1698.

In that year the act of renewal expired. Governor Bellamont called the attention of the assembly to the fact; but, becoming dissatisfied with its proceedings, he dissolved it before any action was taken. Another assembly was convened in 1699,

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fortune, however, was but of temporary duration. He again went to England, in 1693, and in a very short time became a member of parliament for Newtown, where, some years afterwards, he made strenuous but ineffectual opposition to the reversal of Leisler's attainder. He sat in parliament for eight years, during which time he was appointed lieutenant governor of the Isle of Wight. He had now reached a position that might have satisfied a man of ordinary ambition; but, to quote the language of a New England writer, he preferred to be the first man in New England, to any subordinate position in the mother country; and, accordingly, in 1702, he received a commission from Queen Anne, appointing him governor of Massachusetts. He was governor of Massachusetts for thirteen years, and died in 1720, after a life marked by many vicissitudes and changes, at the age of 72. Governor Dudley, or, as he is usually designated by Massachusetts writers, the second Governor Dudley was, in an intellectual point of view, a highly accomplished man. He had the advantage of an excellent education at his outset in life; had studied divinity and law; afterwards, and in an age distinguished for its activity in metaphysical inquiries, he was attracted to and devoted much of his time to the cultivation of philosophy. His love of study, however, and the extensive knowledge he had acquired, had little effect upon his character, for he was essentially a wordly minded man, with whom the possession of power and of exalted station was the chief end and object of life. Struggling throughout the principal part of his career for power and place, he was not over scrupulous as to the means he employed. Cringing with low servility to those he despised, and using the information he possessed, secretly, to the disadvantage of the interests of the colonies, when he expected thereby to forward his own. The thirteen years that he was governor was the most useful and blameless period of his life; but his antecedents had been such, that his government was bitterly assailed by his enemies; unfounded charges of corruption were made against him, and he was frequently referred to as mainly responsible for the guilt of Leisler's blood, and held up to public execration as a common murderer. It is to be taken in vindication of his character, that if he was fiercely assailed by his enemies, he was warmly supported and steadfastly adhered to by his friends; and that some of his good qualities were so prominently conspicuous, as to be fully acknowledged by those who were opposed to him. As a public man, he was exacting and ceremonious; diligent in the discharge of the duties of his station, and disposed to administer public affairs uprightly, where it did not conflict too much with his own interests. Throughout his life he was scrupulous in the observance of the outward conventionalities of religion; and in the latter part of it, had the reputation of being, and may have been, a sincere Christian. In all that belongs to the domestic duties, and in the more private relations of life, his conduct would seem to have been unexceptionable; and his character is very well summed up by the remark of Hutchinson, that he had as many private virtues as was consistent with a man of his wordly aims and aspiring ambition. 3 N. Y. Col. Doc. 364, note. 1 Smith, 123. 2 Hutchinson's Mass. 193. Allen's Biographical Dict'y, 350. 2 Bancroft, 427, 445.

[1] 3 Col. Doc. 716. 1 Smith, 116. 1 Dunlap, 213.

[2] Mans. Laws of 1692, in N. Y. State Library. This act is printed in Bradford's first edition of the laws, 1694.

and a bill for the further continuation of the courts was passed, with alterations and amendments, and sent to the governor.[1] Bellamont was of opinion that the original act had been designedly altered by the assembly, as a party movement, by the insertion of inconsistent amendments, and of provisions repugnant to the laws of England, for the purpose of compelling him to reject it, that the province might be left without any judicial tribunals, and the responsibility thrown upon him. He refused his assent, and the assembly declining to take any further action in the matter, immediately adjourned. The province was now without courts, and the assembly appeared to have gained their object; but in all the governor's commissions, from the time of Dongan, there was a general provision authorizing them to erect and establish courts. A provision to this effect existing in Bellamont's commission, he called in Chief Justice Smith, and Graham, the attorney general, and advised with them as to the extent of his powers. They were of opinion that the king could not establish courts of justice by his own authority, without the concurrence of parliament, and that what he was incapable of doing himself, he could not delegate to his governors. But Bellamont had little confidence in the opinion of either Smith or Graham, neither of whom had been educated as lawyers; and he replied, that as all the commissions were prepared under the supervision of the attorneys general, and were passed under the eyes of the chancellors, such a provision would not have been inserted or suffered to remain, unless the power formed a part of the king's prerogative;[2] and accordingly, on the 15th of May, 1699, he published an ordinance, with the concurrence of his council, re-establishing all the courts, precisely as they had existed under the amendatory act of 1692, and the acts in continuation.[3]

Lord Bellamont died in 1701, and in the interval between his death and the arrival of Lord Cornbury, the government was assumed by Lieut. Governor Nanfan. Before Cornbury's arrival, William Attwood came out as chief justice, having been appointed to the office by the king, bringing with him a commission from the lords of the admiralty, authorizing him to act as judge in admiralty.[4] Though provision was made for a court of chancery by Bellamont's ordinance, no court was established.[5] Bellamont was anxious to erect one, but he seems to have been doubtful in respect to his powers, as he wrote home that many were likely to be ruined for the want of such court; but that he could not hold one without the presence of five of his council, and that that number rarely attended.[6] Accordingly, the lords of trade sent out an order to establish the court, upon receiving which, Nanfan, on the 2d of April, 1701, published an ordinance erecting a court of chancery, to be composed of the governor and council, or any two of the board, to be held on the first Thursday of every month; and he appointed a register, clerks and masters.[7]

This ordinance was strongly opposed by the assembly, who denied the right of the king to erect a court of equity in the province; and in the following year a petition was presented by William Hallett and others, to the assembly, complaining of the erection of the court, of the exorbitant fees taken by its officers, and of its arbi-

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[1] Jour. of Ass. 1698 and 1699.
[2] 4 Col. Doc. 515.
[3] This ordinance will be found in the appendix to 2 Rev. Laws of 1813, No. 5.
[4] 4 Col. Doc. 1000. Jour. of Ass. 1701-2. 1 Smith, 163.
[5] 4 Col. Doc. 828.
[6] 4 Col. Doc. 834.
[7] 4 Col. Doc. 885. 1 Smith, 158. 1 John. Ch. R. preface.

trary and unjust decrees.[1] On the arrival of Lord Cornbury, in 1702, an order was made in council suspending the court, until the governor and council should determine upon such a regulation of its proceedings as would be "most agreeable to justice and equity;" and the matter was referred to Chief Justice Attwood, and De Peyster, the second justice of the supreme court, who, after having the subject before them for nearly two years, sent in a report, including a table of fees, upon the receipt of which, Cornbury published an ordinance, on the 7th of November, 1704, reviving and re-establishing the court, which he declared should be conducted thereafter according to the method of the high court of chancery in England.[2] Two sessions of the supreme court at the city of New York having been found insufficient for the dispatch of public business, he also published an ordinance in the same year,[3] directing that the supreme court should hold four terms a year, of five days each, in the city of New York, on the first Tuesdays in March, June, September and October, or at such other places as the governor and council might by proclamation appoint; by virtue of which ordinance, the supreme court and the court of chancery were held down to the time of the revolution.

After Lord Lovelace came out as governor, in 1708, the opposition to the court of chancery was renewed. In that year the assembly resolved that the establishing of such a court, without the consent of the legislature, was contrary to law, without precedent, and dangerous to the liberty of the subjects;[4] and it would seem, that upon the governor's death, which occurred shortly after his arrival, and during the somewhat irregular administration of Ingoldsby, that the court again fell into disuse. This was brought to the notice of the lords of trade and plantations, to whom the management of the colonies was chiefly entrusted, and when Governor Hunter was sent out in 1710, his attention was called to the subject; and, shortly after his arrival, he re-established the court, appointing two masters, two clerks, an examiner and a register, and took upon himself the office of chancellor.[5] This again roused the opposition of the assembly. They passed resolutions, declaring the illegality of the court, and sent a memorial on the subject to the lords of trade and plantations; but it was followed by an answer declaring, that the erecting of a court of equity by the governor, with the advice of his council, was pursuant to the power granted by her majesty, under the great seal of Great Britain; and that the resolves of the assembly were very presumptuous, and a diminution of her majesty's royal prerogative, for that her majesty had a right to erect as many courts in the plantations as she should think necessary for the purposes of justice.[6]

While the most decided hostility to the court was thus manifested by the inhabitants of New York, a very different feeling prevailed among the people of New Jersey, where no such tribunal existed. At this very period, 1713, Hunter, in writing home to the lords of trade and plantation, says, that the people of the Jerseys "beg and crave for a court of chancery."[7] The true ground, no doubt, of the hostility to the court in New York, was the one assigned many years afterwards by Governor

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1 N. Y. Jour. of Ass. 1702.
2 2 Rev. Laws, 1813. App. xiii.
3 3d of April, 1704. 5 Col. Doc. 409. 2 Rev. Laws, 1813. App. No. 6.
4 Jour. of Ass. of N. Y. 1704, p. 224.
5 Lon. Doc. xxiv. 880. 1 Smith, 220.
6 Pamphlets of N. Y. Hist. Soc. series C. No. 2. 1 Smith, 220. 1 Dunlap, 280.
7 4 Col. Doc. 361.

Cosby.[1] The quit rents reserved upon the sale of all lands, belonged, as a prerogative to the crown; and, through the neglect of the governors, who were mainly occupied in enriching themselves, these rents had been suffered to run greatly in arrear. When the diminution in the king's revenue began to be sensibly felt, orders were sent out to collect the quit rents, and the court of chancery and the exchequer branch of the supreme court were resorted to, to compel payment. If the rents had been collected as they had fallen due, payment would have been readily made; but the people had enjoyed their immunity so long, and the rents had accumulated to such large sums, that the payment of what had accrued was looked upon as a burden, and the attempt to enforce it awakened a feeling similar to that so recently exhibited in the late anti-rent movement. There was, in addition to this, another reason for the prevailing hostility to the court of equity. The governors, almost without an exception, were men of impaired fortunes, or adventurers, who accepted the appointment in the hope of enriching themselves. As the salary was small, the only means of making the office profitable, was by granting patents of land, and receiving from the grantee a gratuity, or, what in this day would be called a bribe, in proportion to the value or extent of the tract granted. In this way immense tracts had been disposed of—some of them, to use the language of an authority of the day, "as big as provinces"[2]—a few of the governors, like Clarke, amassing large fortunes. The manner in which these grants were made, was undoubtedly a fraud upon the rights of the crown; and, as fears were entertained that proceedings might one day be instituted by the attorney general, in the court of equity, to invalidate these titles, nearly all the large landed proprietors of the colony had a common interest to get rid, if possible, of this dreaded jurisdiction. In the long controversy respecting the equity courts, these reasons were not ostensibly put forth; but that they lay at the bottom of the movement, at least at the beginning of it, there is little reason to doubt.

From 1713 to 1727, the court of chancery was regularly continued; but in 1727, several important decrees made by the court, gave rise to loud and general complaint; and at the meeting of the assembly, the committee on grievances reported, that through the violent measures taken in and allowed by the court, several persons had been ruined, others obliged to abandon the colony, and that many had been restrained from departing from it, by imprisonment and by excessive bail, even when no suits were depending against them, and that they were of opinion that the exorbitant fees countenanced and exacted by its officers and practitioners, had made it the greatest grievance and oppression the colony had ever felt; and, after passing a resolution, declaring the illegality of the court, they resolved, that at their next meeting they would prepare and pass an act, declaring and adjudging all orders and ordinances, devices and proceedings of the court, to be null and void.[3] The leading man in this movement in the assembly was the speaker, Adolph Phillipse. He had recently lost a suit in the court of chancery; and Governor Burnett, as chancellor, had signed the decree against him but two days before the passage of these resolutions. Burnett, indignant that a branch of the legislature should allow themselves to be influenced against the court by a defeated party to a suit, dissolved the assembly;

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[1] Lon. Doc. xxiv. 880.

[2] Lon. Doc. xxiv. Morris Letter.

[3] Journals of Col. Assembly, for 1727. 2 Smith, 280, 281.

and, in assigning his reasons for doing so, stated, that Phillipse had been a member of Hunter's council when the court was re-established, and concurred in the act; that, if the object was really to correct abuses in the court, some measures should have been proposed; but that the passage of the resolution in a clandestine manner, at the end of the session, was designed to bring him, the governor, into discredit, and to impress the people unfavorably towards the government.[1] It certainly had that effect; for the excitement produced was so great, that, in the spring following, the whole matter was referred to a committee of the council, which resulted in the publication of an ordinance correcting many of the abuses of the court, and so materially reducing the fees, that, says Smith, writing forty years afterwards, "the wheels of the chancery hath ever since rusted upon their axis—the practice being contemned by all gentlemen of eminence in the profession."[2]

Though provision had been made in all the previous acts and ordinances, for the appointment of a chancellor, none appears to have been commissioned; but when the governor did not act in person, the decision of matters in equity were left to the chief justice or his associates, who were generally members of the council, or to one of these judges, with other members of the council, who were of the legal profession. The act of 1691 declared that the governor might be assisted in the court of chancery, by such members of the council as he might think fit and necessary; and by Nanfan's ordinance of 1701, the court was to consist of the governor and his council, or any two of the board. Lord Cornbury sat occasionally as chancellor, with Attwood to assist him;[3] but his successor, Governor Fletcher, would have nothing to do with the judicial determination of any thing affecting property, until the matter came regularly before him, upon appeal, or by writ of error.[4] During the ten years that Hunter was governor, he sat constantly as chancellor. Upon re-establishing the court, he wrote to the attorney general in England respecting his powers, who advised him that he was the sole judge of the court; and throughout his term he presided alone,[5] as did also his successor, Governor Burnett.[6] Burnett, who was the son of Bishop Burnett, the celebrated author of the "History of his Own Times," took especial pleasure in sitting as chancellor. He was no lawyer; but being a man of extensive reading, of good sense, and of a cultivated literary taste, he fulfilled his duties as chancellor respectably. Smith says, that no governor before him ever did so much business in the court; but, according to the same authority, he had one great defect, which he frankly confessed himself, that of acting first, and thinking afterwards.

Montgomery came out as governor in 1728. He was a soldier by profession; had been a courtier and a member of parliament, and with an honest acknowledgment of his unfitness to discharge the duties of such an office, he refused to act as chancellor. This refusal was highly gratifying to the assembly, and strengthened the opposition to the court. As soon, however, as it was known in England, a special order was sent out, directing him to assume the duties of the office. He com-

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[1] Lon. Doc. xxiii. 5 Col. Doc. 847. Pamphlets of the N. Y. Hist. Soc. series C, No. 2, Appendix.

[2] 1 Smith, 280.

[3] 4 Col. Doc. 885, 923, 1010.

[4] 5 Col. Doc. 409.

[5] Lon. Doc. xxiv. 880.

[6] Lon. Doc. xxiii., xxiv. 880. 5 Col. Doc. 847.

plied, but with great reluctance and aversion, frankly confessing to the practitioners before him that he was entirely unqualified for the station. In fact, he never delivered but one decree, and made but three orders, which, both as to matter and form, he left to his council to settle.[1]

The propriety of hearing equity business on the exchequer side of the supreme court, had frequently been suggested, and Chief Justice Morris encouraged the lawyers to bring equity cases before him,[2] but no one felt willing to take a decisive step as long as the governor saw fit to act. On the death of Montgomery, however, a meeting took place between the lawyers and the judges. It was thought that the people would be better satisfied to have their rights determined by competent and sworn judges; and the judges concluding that they had power to hear equity matters on the exchequer side, several bills were filed in the supreme court;[3] but Rip Van Damm, who, as oldest counsellor, assumed the administration of the government, received peremptory instructions from England to act as chancellor,[4] which he did until the arrival of Governor Cosby. The three governors thereafter, Cosby, Clarke and Clinton, acted as chancellors; and during the several years that Chief Justice Delancey was lieutenant governor, he sat as chancellor with the puisne judges of the supreme court, or members of the council as assistants.[5] He was succeeded by Sir Charles Hardy, who came out in 1753. Hardy was by profession a seaman; and Smith describes[6] the perplexed state in which he found himself, immediately after his arrival, when four eminent counsel, Murray, Nicolls, Smith, the historian, and his father, appeared before the governor to argue a demurrer to a bill in equity: "Gentlemen," said Hardy, "my knowledge relates to the sea; that is my sphere. If you want to know when the wind and tide will suit for going down to Sandy Hook, I can tell you; but what can a captain of a ship know about demurrers? If you dispute about a fact, I can look into the depositions, and perhaps tell who has the best of it; but I know nothing of your points of law." He wanted them to arbitrate the matter. This they would not consent to, insisting that the determination of the demurrer was a branch of his office, when, to his great relief, Chief Justice Delancey arrived who heard the argument and sustained the demurrer.[7]

Hardy undertook to hear a case alone, as it involved principally questions of fact; but he succeeded so badly, that, in the next case, he called in the three justices of the supreme court to assist him.[8] In the address of the assembly, in 1737, it is said, that "few of the governors had talents equal to the task of chancellor, and so it was executed accordingly—some of them being willing to hold the court—others not, according as they happened to be influenced by those about them." As to the manner in which proceedings were conducted, or as to the correctness of the decisions of the governors, or of those who assisted them in the determination of matters in equity, but little information can now be gathered, as but few records of the court of

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[1] Lon. Doc. xxiv. 102, 108. 5 Col. Doc. 880. 1 Smith, 282, 283. 1 Dunlap, 292, 293.
[2] Lon. Doc. xxiv. 880, Cosby's Letter.
[3] Pamphlets in N. Y. Hist. Soc. series C. No. 2, p. 29.
[4] Lon. Doc. xxv. 198. Doc. 102.
[5] 2 Dunlap, Appendix, C. L. xxix.
[6] 2 Smith, 274.
[7] Tingley v. Aldwick, Admx., &c., Rec. in Chancery, No. 54.
[8] Rec. No. 54, p. 64.

chancery, before the revolution, exist, or at least could be found, after a diligent search, and the few that remain are in a very imperfect condition.

In the instructions given governors Sloughter and Fletcher, under William and Mary, they were required to see that a court of exchequer should be convened, at such times as should be needful, and both of them were required to ascertain and inform the board of trade and plantations whether the service of the crown required that a permanent court of exchequer should be established.[1] Whether they took any measures, or whether any such court was held during the ten years that intervened from the arrival of Sloughter to the death of Bellamont, is not known. Smith says that Nanfan erected a court of exchequer; but this is evidently a mistake. An order in council was made in 1702,[2] reciting, that whereas there were several matters depending in the court of exchequer, which could not be finished by the time limited in the ordinance for establishing courts of judicature; that an ordinance should be prepared empowering the court of exchequer to sit and determine all matters which then were, or might thereafter be commenced, or depending before it, until the same should be finished and ended. This had reference merely to the accumulation of cases on the exchequer side of the supreme court; the terms of that court, as fixed by Bellamont's ordinance, not continuing long enough to enable the judges to dispose of the exchequer business; and, in pursuance of this ordinance, Chief Justice Attwood, and the two puisne judges, held sessions of the exchequer side, at a time different from the regular sessions of the supreme court; though, in a short time, the practice appears to have fallen into disuse, or the ordinance may have been repealed; for there appears to have been no proceedings in exchequer thereafter, for thirty years.[3]

In 1733, a dispute arose between Rip Van Damm and Governor Cosby, respecting a mutual claim upon the salary which Van Damm had received, while acting as governor; and as it involved a question of account, cognizable only in a court of equity, the governor, in virtue of his office as chancellor, was cut off from bringing a suit in the court of chancery. The attorney general, consequently, filed a bill before the judges of the supreme court, as barons of the exchequer, and this brought up the right of the crown to create a court of exchequer, and revived all the former agitations against the establishment of courts of equity. Van Damm engaged Messrs. Alexander and Smith, two of the most eminent lawyers of the time, who plead to the jurisdiction, insisting, among other objections, that the supreme court had no power to proceed in equity. The question was argued at length, and the plea overruled—the two puisne judges, Delancey and Phillipse, concurring, and the chief justice, Lewis Morris, dissenting. This decision, which was pronounced before a crowded court, was received with a general burst of indignation. The chief justice delivered a long, dissenting opinion, in writing; the governor demanded a copy, which was sent; but Morris, to prevent misrepresentation, published the opinion in the newspapers. This gave offence to the governor. Morris, who had been twenty years chief justice, was removed, and Justice Delancey appointed in

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[1] 3 Col. Doc. 688, 821.

[2] 6th April, 1702.

[3] N. Y. Hist Coll. 355. Pamphlets of N. Y. Historical Soc. series C. No. 2 containing copies of records and entries before Attwood, C. J., and De Peyster and Walter, in Exchequer.

his place.[1] This decision, and the removal of Morris, augmented the excitement which already existed, and divided the province into two violent factions—the democratic, or popular one, led by Van Damm, and "the people of figure," who took sides with the governor. The right of the supreme court to exercise jurisdiction in equity, was brought before the general assembly at its next session. Petitions were presented for the repeal of the court of exchequer, as a branch of the supreme court, and for the general re-establishment of all the courts, by an act of the assembly. The governor had a majority; but the opposition was so formidable, from the men that composed it, and the strength derived from the popular support, that a resolution was agreed to, inviting the two most prominent lawyers of the respective parties to argue the question before the bar of the house. Mr. Smith, the father of the historian, was heard on the democratic side, and Mr. Murray, the oldest member of the bar, in reply, in an argument evincing on both sides a great deal of ability, and an amount of research and antiquarian information that was scarcely to have been expected;[2] and, as generally happens in the argument of difficult legal questions before a popular body, the members, according to Smith, were so confounded, that they determined to postpone the matter until they could take the sense of their constituents.

The personal bitterness which the controversy provoked, found a ready expression in the public newspapers; and the organ of the popular party, which was published by a printer named Zenger, gave especial offence to the leaders of the party in power, by making them the subject of satiric effusions in verse. The offensive ballads were directed, by an order in council, to be burned by the public hangman; and an information was filed in the supreme court against Zenger, for the publication of other articles, reflecting on the government. The attention of all parties was now drawn off to the prosecution against Zenger. Messrs. Smith and Alexander, as the legal champions of the popular side, volunteered in his defence; and feeling that he must be convicted of libel, if the case was brought to a trial, they excepted to the validity of the commissions of the judges. This was treated by Chief Justice Delancey as a high affront, and Smith and Alexander were stricken from the rolls. On the day of trial, however, Mr. Hamilton, an eminent lawyer of Philadelphia, appeared for Zenger, and by his skill in managing the court, and by insisting upon the doctrine, not then established in England, that in prosecutions for libel, the jury were the judges of the law and the fact, he secured, against the charge of the chief justice, the acquittal of the printer. This was hailed as a great popular triumph, and Smith and Alexander followed it up by renewing the attack upon the court of chancery. In an equity case, then pending before the governor, they excepted to his right to sit as chancellor; and the exception being overruled, they again brought the question before the assembly.[3]

The objection made to the court of chancery, that it was not in the power of the crown to erect such a court without the consent of the legislature, applied with

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[1] Lon. Doc. xxv. 9. 5 Col. Doc. Cosby and Morris Letters. 2 Smith, 8. 1 Dunlap, 296. Memoir of Chief Justice Delancey, 4. N. Y. Doc. Hist. 627.

[2] Pamphlets of the N. Y. Historical Society, series C. Nos. 1 and 2. 1 Smith, 371, and 2 Smith, 17.

[3] 5 Col. Doc. Morris and Crosby's Letters. 2 Smith, 24—28. 1 Dunlap, 300. N. Y. Hist. Soc. Col. 2d series, 47. Mr. Butler's Discourse. Memoir of Delancey. 4 Doc. Hist. of N. Y. 630. Howell's State Trials, vol. xvii. 75. Jour. of Col. Assembly, 1732 to 1737. Bradford's American Weekly Mercury, Nos. 883, 884, for 1735.

equal force to the supreme court, for both tribunals existed by virtue of the same ordinance. This was strongly put by Murray in his argument before the house. The supreme court had continued under Bellamont's ordinance for nearly forty years; and to declare that it had existed without authority, and that all its proceedings were null and void, would have been to disturb titles, and beget a multitude of questions, which an act of the legislature affirming the validity of its proceedings might not be sufficient to settle. So little had been done in the court of chancery, or in the court of exchequer, that the validity or invalidity of either of these courts was comparatively unimportant. But the supreme court was the principal law tribunal of the province, and to disturb all its proceedings, would have been attended with serious consequences. This was felt by Smith and Alexander, and the other leaders of the party with whom they acted. Upon Zenger's trial, they carefully avoided taking any exception to the validity of the court, thinking to gain their object by excepting to the judges' commissions. As they expressed it, they admitted the *being* of the court, but denied that the judges had been duly commissioned to sit in it. Though they were cut off from discussing the regularity of the appointment of the judges by the high handed measure of Delancey, their object was gained by the subsequent acquittal of Zenger. But the abolition of courts of equity had now become a party question. As political leaders, they were bound to pursue it, though conscious that nothing could be done. Their motion before the governor, as chancellor, was overruled; and had they appealed, the governor and his council were the court of review. An appeal lay from that tribunal, it was true, to the king, but the matter had already been brought to the attention of the home government, and its decision had been adverse. There was no hope, therefore, in pressing it as a legal question, and nothing could be accomplished by an act of the assembly. The result of Zenger's trial had produced many changes in that body, and the opposition had now a majority; but had the assembly passed an act abolishing the court, it could be of no effect without the concurrence of the governor. In this dilemma, a few of the more sagacious of the leaders of the opposition tried to effect a compromise. They knew that equitable jurisdiction must be vested somewhere, and that it was of little practical importance in what tribunal it was lodged. They proposed, therefore, that an act should be passed, with the concurrence of the governor, reinstituting all the courts precisely as they stood, and reaffirming all their previous proceedings, so that the courts should exist thereafter by the authority of the legislature, instead of being left to depend for their validity upon the ordinances of Bellamont and Cornbury. Cosby, however, now felt his advantage. He would not consent; and the assembly, finding that nothing could be accomplished, both parties united in an unanimous request that he would dissolve them, and order a new election, to ascertain the wishes of the inhabitants of the province. But Cosby's pride was aroused. He had been personally assailed through the public newspapers, and in private circles; and this he also refused. Indignant at his refusal, the assembly passed a resolution against the court of chancery, similar to those already referred to, and adjourned the session for four months.[1] The question now seemed farther removed from settlement than ever, when an unexpected event changed the whole course of affairs. In the interim Cosby died. He was succeeded by Clarke, a member of the council,

[1] 2 Smith, 32. Jour. of Col. Assembly, 1736.

as acting governor, an able, prudent and conciliatory man. Clarke dissolved the assembly, after an existence of ten years; and though the next assembly were hostile to him, and in reply to his address, renewed the subject of the courts, he managed so judiciously as to calm the turbulence of party spirit, secured the popular support, and brought the leaders of the opposition into discredit, even with their own constituents. One of his first acts was to effect a reconciliation between the judges and Messrs. Smith and Alexander, who were restored to their professional position; and he afterwards kept the assembly busy by his active measures for improving the financial condition of the colony, and rescuing its internal affairs from the state in which they had been left by the neglect of his predecessors.

Other and more important matters began to engross the public attention. The Spanish war, and the events which shortly after led to the French and Indian wars, engaged the thoughts of the colonists, until the old agitation respecting the courts gradually passed from the public mind, and was at length entirely forgotten.

During the forty years that preceded the revolution, the court of chancery was regularly held, all the remaining governors continuing to preside alone as chancellors.[1] It does not appear that the judges of the supreme court undertook again to hold a court of exchequer; but, singularly enough, a court so obnoxious to the popular party in the days of the colonists, was revived immediately after the revolution, as a branch of the supreme court.[2] In 1770, the evil of allowing the governors to act as chancellors was put to the proof. It has been before stated that the governors, in addition to their salary, derived a large income from the fees or perquisites exacted upon granting patents for land. When Sir Henry Moore died, in September, 1669, a number of patents were left unexecuted, the fees upon which amounted to the large sum of £10,000. To secure this sum to himself, Lieutenant Governor Colden hurried through the business of passing the patents, and having completed it before the arrival of Moore's successor, he received the ten thousand pounds. When the new governor, Lord Dunmore, came out, towards the close of 1770, he demanded from Colden the one half of all the fees, perquisites and emoluments of the office, that had accrued from the date of his commission to the time of his arrival, which Colden refused to give up. Dunmore then directed the attorney general to file a bill against him in the court of chancery, in which the governor was the sole judge, to recover back one half of the perquisites, which the governor directed should be filed, nominally, in the name of the crown, but in reality, for his own benefit. The suit was commenced, and Colden, after several counsel had declined, through fear of the governor's displeasure, retained James Duane, of whom we shall have occasion to speak hereafter. Duane, on behalf of his client, demurred to the bill; and when the case came on to be argued, Dunmore, unblushingly, took his seat in court to hear and determine the cause, as chancellor. Duane opened the argument, and showed, conclusively, that the suit could not be maintained, without, however, producing any effect upon the governor, and was replied to by the attorney general and by Smith, the historian; the latter, according to Colden, exhibiting an easiness of principles that enabled him to affirm, deny or pervert any thing, with a degree of confidence that

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[1] Rec. from 13th of May, 1748, to 31st of March, 1770.

[2] Laws of 1786. *Gaine's* Ed. 241.

might easily deceive the unwary. After hearing the argument, Dunmore fixed the following Thursday for giving his decree, but when the day arrived, he put it off for a fortnight longer, and when that time expired, he was still unprepared to decide. According to Colden, he had resolved to decree against him, but considering it prudential, and to avoid its being thought that he was interested, he then referred the matter to the four judges of the supreme court, for their opinion, who unanimously declared that the demurrer was well taken in all its essential points, and that the suit could not be maintained. What the governor would now do, was looked forward to with much interest. Wholly destitute of integrity or principle, he would not decide in favor of Colden, and dismiss the bill, while if he made a decree sustaining it, an appeal might be taken to the king and privy council, where, even if the decree was affirmed, it would not benefit him, the suit having been brought on behalf of the crown; and, in any event, whether it was affirmed or not, the real motive that prompted the suit, and his own conduct in assuming to sit in judgment in a case instituted for his own benefit, would undoubtedly be exposed. He accordingly suffered the matter to remain undetermined, until, in about two months, he was superseded by Governor Tryon, when he left the colony, having been appointed governor of Virginia.[1] In 1774, James Jauncey was commissioned by Governor Tryon as master of the rolls.[2] He was empowered to hear and determine all cases in the court, with the general powers belonging to the master of rolls in England.[3] But, throughout the whole of this period, that is, from 1735 until the revolution, the business of the court was exceedingly small, and its position, as a judicial tribunal, comparatively unimportant.[4]

At first, the judges of the supreme court were appointed by the governor, and held their office during his pleasure. Smith, the chief justice, who succeeded Dudley, though a sensible man, had not been bred to the profession; and Bellamont had no confidence in his opinion respecting the law, in the many difficult questions that were constantly arising. He therefore urged the home government to send out an able lawyer as chief justice; and, after repeated solicitation, Attwood was appointed.[5] He received his appointment in England, in the shape of a warrant or mandamus, which was the usual mode of appointing judges for the colony;[6] requiring the governor to commission him, by letters patent, to be issued under the seal of the province, and attested by the governor.[7] And, as respects the chief justices, this mode of appointment, with one exception, was adhered to thereafter. The motive that induced Bellamont to bring about this change, was a good one; but it produced an effect very different from what he intended; for Attwood was one of the worst chief justices the colony ever had.

A leading object with Bellamont was, to obtain chief justices whose education and

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[1] The writer is indebted for this interesting piece of information to Mr. Bancroft, the historian. It is collected from copies of manuscript letters of Colden, obtained by Mr. Bancroft. There is also a brief reference to the matter in Jones' Memoir of Duane, in which Governor Monckton is confounded with Governor Dunmore. 4 N. Y. Doc. History, 644.

[2] 24th March, 1774.

[3] 6 Rec. of Coms.

[4] Minutes of Court of Chancery, No. 54, 1754 to 1770.

[5] Col. Doc. 441, 515, 550.

[6] Stokes' View of the Constitution of the British North American Colonies, 264 to 267.

[7] Recs. of Coms. ii. 144.

social position in England would place them above the low arts and the corruption that prevailed in the colony;[1] but Attwood had scarcely been in office over a year, when he was removed by Lord Cornbury; and the charge of corruption was the principal reason assigned for displacing him. "Atwood," said Cornbury, in his letter to the home government, "in the execution of his office, as chief justice and as judge, in almost all cases that came judicially before him, by the general report of all present, did, openly, notoriously and most scandalously, and with wonderful partiality, in almost all cases in which his son was concerned as counsel, espoused, and, indeed, pleaded and gave countenance to such causes, and finally gave judgment on y^e^ (son's) side; by means of which, justice was perverted, y^e^ laws abused, and y^e^ subjects exceedingly injured; which recommended his son to great practice, and large sums of money was by parties given to him, to buy his father's favor."[2] The puisne judges continued, as before, to be nominated and commissioned by the governor. They held their office, during his pleasure, while the chief justices held during the pleasure of the crown. A tenure so precarious was productive of very injurious consequences. It not only lessened the independence of the judges, but, as they were generally members of the council, and, consequently, mixed up with all the political questions of the day, they were liable to be removed, and many were removed, upon the change of parties. When Governor Clinton came into office, in 1746, an alteration was made. As a compliment to Chief Justice Delancey, he gave him a new commission, to hold during good behavior;[3] and similar commissions were afterwards granted to some of the puisne judges. The good effects of this change was soon apparent, in the open and long continued opposition of the chief justice to the measures of the governor; an opposition in which Delancey was sustained by the general voice of the colony, and which laid the foundation of the great popularity he afterwards enjoyed. As Delancey's commission was granted by Governor Clinton, without a warrant from the crown, its validity and the tenure of the office was called in question, in 1753; but Sir Dudley Ryder, the attorney general, and Lord Mansfield, who was then solicitor general, to whom the matter was submitted for their opinion, replied, that though it should not have been granted contrary to the usage, still, as a grant, it was good in law, and could not be revoked without misbehavior.[4] Upon Delancey's death, in 1760, doubts were entertained, whether the judge's commissions did not expire with the death of the king—an event which took place in the same year; to remove which, and to render the judges thereafter independent, either of the governor or of the crown, an act was passed by the general assembly, to compel a reappointment of judges, who should hold their offices upon the tenure of good behavior. To this act, Lieutenant Governor Colden refused his assent; and when the time approached for holding the term, the judges demanded from him new commissions, upon the former tenure, of good behavior. This was refused, and the judges threw up their commissions. The chief justiceship, rendered vacant by the death of Delancey, was offered to Smith, the father of the historian, to hold during the pleasure of the crown; but he declined accepting it upon that tenure, and the question remained unsettled for some time;

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[1] 4 Col. Doc. 515, 550.

[2] Cornbury's Letter to the Lords of Trade. 4 Col. Doc. 1010.

[3] 3 Rec. of Coms. 420. 2 Smith, 194.

[4] Lon. Doc. xxxi. 65.

until, finally, two of the old judges, Horsmanden and Jones, accepted commissions during the king's pleasure.[1]

In 1763, the general assembly sent a memorial to George III., requesting that, in accordance with the example set by William III., and in conformity with the recommendation contained in his own speech upon ascending the throne, that the appointment of the judges should be perpetual during their good behavior. The memorial was referred to the treasury board, of which Lord North was a member, and it was determined, doubtless through his influence, that the tenure of the chief justice should be the king's pleasure, as well as the amount and the payment of his salary; and the judges remained thereafter entirely dependent upon the crown.[2]

It has already been stated, that after the creation of the court, in 1691, five judges were appointed. When Attwood came out, in 1701, all the puisne judges had ceased to act, and Attwood sat alone on the bench,[3] until Abraham De Peyster, who had preceded him as chief justice, and Robert Walters, were commissioned as puisne judges. The act of 1691 had fixed the number of the justices at five, but Bellamont's ordinance made no provision as to their number, and three, probably, having been found sufficient for the wants of the province, no change was made for fifty six years, the court, during the whole of that period, consisting of a chief justice and two puisne judges. When Chief Justice Delancey was appointed lieutenant governor he did not resign his office as chief justice, but left the duties of the court to be performed principally by his two associates. This was found to be very inconvenient; and in 1758, a case arising respecting lands claimed by Trinity Church, of which the two puisne judges, Chamber and Horsmanden, were trustees or vestrymen, David Jones, the granduncle of the late Chief Justice Samuel Jones,[4] was appointed by Delancey an additional judge of the court; and it consisted thereafter of a chief justice and three puisne judges.

The salary of the judges was at no time sufficient to maintain them.[5] Chief Justice Dudley received £150 per annum; the second judge, Johnson, £100; the remaining judges and the attorney general had no compensation. When Attwood was appointed, his salary was raised to £300; the second judge's increased to £150, and the third judge was allowed £50.[6] Montgomery, in 1729, reduced the salary of the chief justice to £250;[7] but after the accession of Delancey to the office, it was restored to £300; and Gov. Tryon, after 1772, raised the salary of Chief Justice Horsmanden to £500.[8] The smallness of the salary and the uncertainty of the tenure prevented the eminent lawyers from aspiring to the station; and the puisne judgeships were filled by men of affluence, but few of whom had any knowledge of law, or were men of much capacity.[9]

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[1] 2 Smith, 352.

[2] 4 Bancroft, 429—441. 5 *Id.* 84. Stokes' View of the Constitution of the British North American Colonies, 264.

[3] 4 Col. Doc. 923.

[4] Rec. of Com's, v. 147—224.

[5] Lon. Doc. xxxvi. 1.

[6] 5 Col. Doc. 104.

[7] Lon. Doc. xxiv. 880.

[8] Lon. Doc. xlvi. 157.

[9] Stokes on Const. of British North American Colonies, 264 to 267. 1 Smith. 4 Col. Doc. 441, 515, 550.

From the manner in which lands had been obtained by grant and patents, a feudal aristocracy had sprung up in the colony, and the influence of dominant families was felt, either in controlling the administration of public affairs, or in active opposition to those who had the mastery.[1] From these families the puisne judges were usually selected, and as they were generally members of the council, the station was eagerly sought, from the dignified position it gave, and the political influence it commanded. While presiding in court, none of the judges wore any official costume, as was customary at the time in England, in the West Indies, and in some of the other colonies; nor was any distinguishing costume worn by the lawyers, though in other respects the forms and ceremonies of the English courts were adhered to.[2]

There were thirteen colonial chief justices: Joseph Dudley, William Smith, Abraham De Peyster, William Attwood, John Bridges, Roger Mompesson, Lewis Morris, James Delancey, Benjamin Pratt and Daniel Horsmanden, nearly all of them men of ability. Delancey, who filled the office for twenty seven years, was the most prominent, and perhaps the most distinguished. He was the son of a French Huguenot, who had amassed a large fortune in the colony. Having received a university education abroad, he became, at an early age, an active leader in public affairs, and continued, until the close of his life, to occupy a public station. In legal learning he was inferior to several prominent lawyers of the time, but he had remarkable natural abilities, upon which he depended, as he read but little, and was very averse to writing. Upon the bench he applied himself closely to the matter before him, and having a very retentive memory, acute perception and a sound judgment, he was enabled to dispose of elaborate cases with great readiness, and to the general satisfaction of the bar. Whatever he had read or had acquired in the way of legal learning, in the course of his experience, he could produce upon the instant. Having all his knowledge thus promptly at command, and with a mind so constituted, that it lost its force or its grasp of a subject in proportion as he delayed to deliberate, he was generally ready to act at once; his first thoughts being always the best, expressing himself, whether from the bench or in the halls of legislation, with clearness, brevity and point. As a political manager he was intrepid, prompt and sagacious, fertile in expedients; in critical emergencies baffling his opponents, and attaining his end with consummate tact and judgment. In public contests he was a master of the arts that win popularity, and, as a ruler, equally a master of the more difficult art of retaining it; for though a strong conservative in his politics, and generally opposed to the popular party, no man in the colony ever worked himself so fully into the public confidence, or had the same amount of personal influence. He is described by his contemporaries as remarkable for his convivial qualities, as easy of access, assiduous in the despatch of public business, and steadfast in his friendships. It is to be regretted that he marred his otherwise irreproachable conduct on the bench by giving way, in political cases like that of Zenger, to the feelings of a partisan; and involved, as he was, throughout his long career, in every political intrigue and party movement, his character, in other respects, has not escaped without reproach. But he was a man of more integrity than he received credit for during life; and when the government was entrusted to his hands, he administered it with so much ca-

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[1] Lon. Doc. xxxvi. 1.

[2] 1 Smith, 376.

pacity, and with so single an eye to the general welfare of the province, as to wring a reluctant tribute from his enemies.

Of the colonial lawyers, whose lives were devoted exclusively to their profession, but little is necessarily known. In most mental pursuits, an opportunity is afforded for achieving something which may remain as a memorial of the life and labors of the mind that created it. The sculptor who works out a statue from a block of marble, has the satisfaction of knowing that his efforts are embodied and adequately represented in what he has produced; but the life of a lawyer is usually devoted to attaining results that cease to be of interest when the end is accomplished, and it matters not how great may be his talents, how extensive his learning, or unwearied his industry, unless he has had leisure to compose judicial works, he can leave little behind him that will interest posterity, or which will serve to show of what he was capable. A forensic argument, or the occasional report of a trial, may survive, but such fragmentary memorials are not of themselves sufficient to prove that a man had attained to commanding eminence in a profession, where general excellence depends upon the possession and thorough cultivation of so many qualities. Even those endowments which are looked upon as the highest in this most difficult and onerous profession, which are deemed the greatest, because the most essential, and in which the chief excellence of a lawyer lies, are not those which attract general attention or lead to great public renown. The foreshadowing sagacity that perceives in advance all the probable exigencies of a case, the close attention which suffers nothing to escape, but upon a trial keeps every faculty intent upon the case as it is developed, the cool collectedness which is never disturbed by the unexpected disclosures of evidence, or embarrassed by a legal objection, but is able at the instant to meet each emergency, and put the best aspect upon it, the skillful and adroit management of partial, prejudiced, thoughtless or dishonest witnesses, and the power at the close of a trial, or upon an argument, of resolving a complicated mass of facts into their due relation to each other, and, of deducing the principles which grow out of the case and by which it must be governed, together with the power of using his learning with nice and discriminating judgment, are the qualities which secure the successful end aimed at in every legal controversy, but are not those which bring down the plaudits of the multitude. This eminent professional merit, the fruit of strong natural ability, coupled to great industry and experience, has, during the lifetime of its possessor, but a few select admirers; and when he has passed away from the stage of life, there is nothing but their recollections to float him down the stream of time, until he is lost in the mist that finally enshrouds all that is traditional.

The first English lawyer whose name appears upon the records, is John Tudor. He practiced for many years in the mayor's court, appears to have been familiar with the Dutch language, was recorder of the city from 1704 to 1710, and died in 1715.[1] The account given by Bellamont, in 1698, of Tudor's contemporaries, who was a gentleman and a high minded man, and whose statement may therefore be relied on, is far from being flattering. He says that nearly all who then called themselves lawyers, and practiced in the colony, were men of scandalous characters; that none of them had ever been barristers, or aimed at anything higher in England than the duties of an attorney; that one had been a dancing master, another was by trade a

[1] Rec. of Mayor's Court, 1674.

glover, and that a third, one Jamison, had been condemned to be hanged in Scotland for burning a Bible and blasphemy; that it was grievous to see the miserable way in which they mangled and profaned "the noble English law," and that in addition to their ignorance, they were all, with one or two exceptions, violent enemies of the government, and were doing a world of mischief by infecting the people with an ill disposition towards it.[1] The lawyers in the time of Chief Justice Delancey, were men of a very different stamp, and as a body, would have done no discredit to Westminster Hall. William Murray, who was then the senior member of the bar, and had been for many years attorney general, was a man of much legal experience, able upon the argument of a law question, but in no other respect remarkable. William Smith, the father of the historian, and towards the close of his life, a judge of the supreme court, was an able lawyer, an impressive and eloquent speaker, and a man of varied attainments. In addition to his high merit as a lawyer, he was an excellent theologian, a proficient in the French, Greek, Latin and Hebrew languages, and something of an adept in the sciences, but was especially distinguished for his oratorical powers, having the unusual natural advantages of an impressive person, a fine voice, great fluency, and an active imagination. James Alexander stood, as a lawyer, for more than a quarter of a century, at the head of the profession. He was an uninteresting speaker, but a man of great sagacity and penetration, deeply read in the law, so that his opinion upon any legal question, it is said, was received or listened to as the response of an oracle. Hé surpassed all his contemporaries for his close application to business, and yet found time to acquire, for one not especially devoted to such studies, an unusual amount of knowledge in several of the natural sciences. Alexander was a native of Scotland, and the claimant of a Scotch peerage, which passed to his son, the Earl of Sterling, and he died in 1756, after having amassed a large fortune, the fruits of an upright, an arduous and highly honorable professional career. There was also another lawyer of marked ability in the colony at this period, Francis Harrison; but after having held several important judicial stations, he became involved in transactions that covered him with well merited obloquy, and he left the colony in disgrace. Immediately before the revolution, the bar of New York presented a galaxy of remarkable men, too numerous for individual notice. Among its senior members were William Smith, the historian, Samuel Jones, father of the late chief justice, John Morin Scott, Richard Morris, William Livingston and Benjamin Kissam; and its junior members embraced the well known names of John Jay, James Duane, Gouverneur Morris, Peter R. Livingston, junior, Egbert Benson and Peter Van Schaack.

It has been already stated that commissions in admiralty were granted by the early governors,[2] and that jurisdiction was occasionally exercised by the mayor's court. In the instructions given to Dongan he was directed to establish a court of admiralty. He granted a commission to Luke Santon to act as judge in admiralty, and Santon heard several cases,[3] but no court was erected. Leisler, during his brief administration, issued a commission for a court of admiralty, and placed De Lanoy, whom he had appointed judge of the oyer and terminer, at the head of it.[4] Upon

[1] Lord Bellamont's Letter to the Lords of Trade and Plantation, Dec. 15, 1698. 4 Col. Doc. 441.
[2] Rec. of Wills in N. Y. Surrogate's office, vol. i. 5.
[3] Rec. of Wills in N. Y. Surrogate's office, vol. i.
[4] 2 Doc. History N. Y. 36, 164.

Governor Fletcher's arrival, in 1692, the court was permanently established. He authorized Smith, the chief justice, to act as admiralty judge until one should be nominated by the lords of admiralty, and the attorney general, Graham, to act as advocate for the crown, and he appointed, as permanent officers of the court, a register and a marshall.[1] The chief justices continued to act for some time thereafter, until Bellamont complained of their inefficiency. He urged the appointment of an admiralty judge, and in 1703, Roger Mompesson was duly commissioned as admiralty judge for New York, New Jersey, Connecticut, Rhode Island and Massachusett's Bay.[2] In 1721, this jurisdiction was limited to New York, Connecticut, and New Jersey,[3] and an appeal lay to the high court of admiralty in England, until about 1770, when an appellate court, called the Superior Court of Admiralty for North America was instituted, to which an appeal lay from all the colonial tribunals.[4] The court of admiralty was continued in this state after the revolution, until the organization of the United States District Court, by the judicial act of 1789.[5]

It has also been stated that jurisdiction in the proof of last wills and testaments, and the granting of letters of administration upon the estates of intestates, was originally vested by the duke's laws in the courts of sessions, and was occasionally exercised by the mayor's court. The provisions in these laws requiring wills to be registered in the office of records in New York, gradually led to the vesting of this jurisdiction exclusively in the governor. The office of records was in charge of the governor's secretary, or, as he was styled, the secretary of the province, and in the first year of Nicolls' administration, he began to grant letters of administration, and do other acts pertaining to estates, by virtue of his prerogative. This practice was continued by his successors, and, in Dongan's time, wills were proved before the governor.[6] Under Sloughter, all documents pertaining to the proof of wills, or to the administration of estates, were authenticated by a particular seal, denominated the seal of the prerogative office; and this jurisdiction became more decided and settled.[7] During the administration of Governor Fletcher, an act was passed by the general assembly, in 1692, for regulating the probate of wills.[8] This act provided that two freeholders should be appointed or elected for every town, whose duty it should be to take charge of the estates of intestates. It also provided that the probate of wills should be made before the governor, and that letters of administration should be granted by him, or by such person as he should delegate, under the seal of the prerogative office. All wills relating to estates in King's, Westchester, Richmond, Orange and a few other adjoining counties, were required to be proved in New York, before the governor or his delegate; but, in consequence of the remoteness of the other counties, and the expense and inconvenience of bringing witnesses, the courts of common pleas were authorized to take the proof, and transmit the proceedings had before them, under the hand of the judge of the court, and of the

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[1] Rec. of Coms. ii. 124. 4 Col. Doc. 112, 1000. Stokes, 270.
[2] Rec. of Coms. ii. 144.
[3] Rec. of Coms. iii. 217. 1 Smith, 877, 2d. Ed.
[4] 1 Doc. History, 512.
[5] Laws of 1778, Holt's Ed.
[6] Rec. of Wills, vol. i.
[7] Rec. of Wills, vol. iv. 34, 35.
[8] Laws of Col. of N. Y. Bradford's First Ed. of 1692. 1 Jones & Vauck's Ed. 14.

clerk, to the secretary's office, at New York. After the passage of this act, the governor appointed a delegate to act as his representative in the city of New York; and the new tribunal thus organized, and presided over by the governor's delegate, took the name of the prerogative court, to which an appeal lay from any proceeding relating to the probate of wills in the courts of common pleas, or from any of the acts of those empowered in the towns to take charge of the estates of intestates. Delegates subordinate to the governor's representative at New-York were appointed by the governor, for particular parts of the state or counties—usually judicial officers, with this duty superadded[1]—and the freeholders of the towns appointed or elected under the act of 1692, to take charge of the estates of intestates, also took the name of delegates, and, in course of time, the term surrogate, which means (*surrogatus*) a substitute, deputy or delegate, gradually came into use, to designate all these subordinate delegates, and has continued in use ever since, to designate this class of public officers. In 1754, a judge of probate for the province was appointed, with general power to take proof of wills, and to administer estates. The tribunal over which he presided was termed the court of probate, while the prerogative court, which appears thereafter to have been under the direction of the governor's secretary, was continued, with certain powers, until the revolution.[2] By the act of 1778, all the powers which had been vested in the governor of the colony, as judge of the prerogative court, or in the court of probate, except in the appointment of surrogates, was vested alone, thereafter, in the court of probate, and Lewis Graham was appointed judge of the court by the council of appointment;[3] and, in 1787, an act was passed, directing that surrogates should be appointed, thereafter, for every county.[4] The judge of the court of probate had jurisdiction, in all cases of persons dying out of the state, or of persons dying within the state, who were not inhabitants, with a general appellate jurisdiction over the surrogate courts. In 1823, the court of probate was abolished, and its appellate jurisdiction transferred to the court of chancery—the surrogate still continuing—their duties being prescribed by various statutory enactments.[5]

In 1753, the right of appeal from the decisions of the supreme court or of the court of chancery, to the governor and council, which had previously been allowed, when the amount involved exceeded £100, and from the decisions of the governor and council to the king and privy council, when it exceeded £300, was allowed only to the governor and council when it exceeded £300; and to the king and privy council when it exceeded £500; a limitation which was bitterly complained of, as cutting off the right of appeal in the great majority of cases.[6]

In 1730, Governor Montgomery granted to the city of New York an amended charter. It directed that the court of sessions should hold four terms a year; and that the mayor's court should set every Tuesday. It further provided, that the mayor, recorder and aldermen, or any one of them, might try causes, with or without a jury, where the amount in controversy did not exceed forty shillings; and created

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[1] 2 Thompson's Long Island, 442. Account of Tangier Smith.

[2] Rec. of Coms. v. 70, 412, 418, 419; vi. 201. Rec. of Wills and Deeds, in N. Y. Surrogate's Office, vols. xi. xiv. xix. Rec. of Wills, in same office, vols. i. iv. vi.

[3] Laws of N. Y. 1778, 12, Holt's ed. Rec. of Coms. vi. 201.

[4] Laws of 1787, Jones & Vauck's edit. printed by Gaines, 72.

[5] Laws of 1823, 62.

[6] 1 Smith, 378.

eight attorneys of the mayor's court, all of whom were named in the charter. No other attorneys but those named were authorized to practice in the court; and upon the death or removal of any one of them, the successor was nominated by the court and approved by the governor. As thus constituted, the mayor's court and court of sessions continued until the revolution.

At the breaking out of the revolution, Chief Justice Horsmanden, Justices Thomas, Jones and George D. Ludlow, and Jauncey, the master of the rolls, adhered to the cause of the crown;[1] while Justice Robert R. Livingston[2] Joined the revolutionary party. The royalists retained possession of New York, Long Island and a part of Westchester, and within these limits the judges who had adhered to the royal cause continued to exercise jurisdiction. Justices Jones and Ludlow retired to their farms on Long Island, but Horsmanden remained in the city of New York, and continued to exercise his functions until his death, in 1778,[3] when the sole administration of judicial affairs was entrusted to Justice Ludlow. Two years after, in 1780, Ludlow, in addition to his powers as justice of the supreme court, was created master of the rolls, with power to "hear and determine controversies until civil government should be restored." He also acted as judge in admiralty, and was appointed superintendent of police for Long Island.[4] In the same year, 1780, Robertson, the last of the royal governors, issued a conciliatory proclamation, announcing that he had brought out a royal appointment for supplying the place of chief justice; and that as soon as the public exigencies would permit, he would give an order for opening the courts of judicature, and convene the assembly.[5] But his proclamation produced no effect, and he did nothing under it until the following year, when he held a court of chancery, in person, about once every month, from the 24th of January, 1781, until the 9th of June, 1783.[6] But little can now be ascertained respecting judicial proceedings in this part of the state, during this period, as the loyalists carried off the records relating to it, which had been kept in the city of New York.[7] It is merely known that Justice Ludlow continued to act as the principal judge, until the close of the war, when he went to Canada, and became chief justice of the province of New Brunswick.[8]

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[1] Act of Banishment and Forfeiture, 22d of Oct. 1779. 1 Greenleaf's Laws of N. Y. 26. Act of Restoration, April 3, 1790. Laws of N. Y. 13th sess. *Child's & Swaine's* ed. Sabine's American Loyalists, 367, 385, 461.

[2] Sedgwick's Life of Wm. Livingston. Journals of Provincial Congress of N. Y.

[3] Lon. Doc. xlvi. 157. Rec. of Trinity Church for 1778.

[4] Sabine's American Loyalists, 367, 385 and 431.

[5] 4 N. Y. Doc. History, 655.

[6] Records for 1781-2-3.

[7] Lon. Doc. xlvii. 52, 61. Tryon's Letter.

[8] As Judge Ludlow was the last of the colonial judges, and as but little is known respecting him, it may not be out of place to state what has been collected chiefly from traditional but very reliable sources of information. He was originally apprenticed to an apothecary, but disliking that pursuit, he studied law. Though an assiduous student, his friends generally predicted his failure, as he had a serious impediment in his speech; and were very much surprised, at seeing him, when he appeared in his first cause, acquit himself with an ease and fluency altogether unexpected. In commencing practice, he gave his attention exclusively to commercial matters, and acquired so much proficiency, that he was constantly employed, either as an arbitrator in deciding mercantile disputes, or in the adjustment and settlement of complicated mercantile transactions. This drew him into commercial pursuits and speculations, and having, by honest industry and great assiduity, acquired, at a comparatively early age, an ample fortune, he retired to a hand-

As soon as the news of the battle of Lexington reached New York, a republican convention was called; but after sitting three days, it adjourned, recommending that the inhabitants of each county should elect delegates to a general convention. In pursuance of this recommendation, the electors met in the towns and districts of the several counties; but instead of electing delegates directly, they elected for each county a county committee, and this committee appointed delegates to the general convention, or, as it was called, the provincial congress. The provincial congress met on the 22d of May, 1775, and was mainly occupied with the general interests of the republican cause, while the county committees exercised all the functions of a civil government, within their respective jurisdictions. So far as the provincial congress gave any direction, the county committee conformed to it; but they generally acted on their own responsibility, exercising legislative, executive and judicial functions. As the county committees were large, they could not, at all times, be readily convened, and accordingly sub-committees were appointed or elected in some cases for particular districts in the county; and in the locality for which they were appointed or elected, these sub-committees exercised all the powers vested in the committee of the county, but subject to its supervision and control.[1] The republican organization, therefore, consisted of the district committees in each county, the general county committee, and a provincial congress for the colony at large, composed of delegates from the several counties. The exercise of judicial powers was entrusted almost exclusively to the district committees. They were usually composed of two or three persons; their proceedings were entirely *ex parte*, and consisted mainly in arresting and imprisoning all who were supposed to be favorable to the interests of the royalists, or who spoke disrespectfully of the republican cause, its leaders or adherents. The slightest suspicion or any expression of unfriendliness was sufficient to justify an arrest, and imprisonment without bail, for an indefinite period; and where, as was frequently the case, individuals were arrested without cause, they had not only to suffer imprisonment before they could obtain their discharge, but were compelled, upon receiving it, to pay all the costs and expenses that had been incurred by the unfounded proceedings against them.[2] In fact, in the disturbed state of affairs, these tribunals were resorted to and made use of to gratify the private malice or the vindictive feelings of individuals; and their unjust and arbitrary proceedings gave rise to loud and general complaint. This state of things lasted for about two years, when, in conformity with the resolution of the continental congress, delegates were elected to a convention to organize a government.[3] This body, which was denominated the "convention of the representatives of the state of New York," assembled at White Plains, on the 9th of July, 1776; and after shifting from place to place, to avoid the approach of the enemy, the delegates finally assembled at Kingston; and on

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some estate which he had purchased upon Long Island. Shortly after his retirement, he was appointed judge of the court of common pleas, in which he gave so much satisfaction, that in 1769, he was made a puisne judge of the supreme court. Though he labored under the disadvantage of deafness, in addition to the impediment in his speech, he was, nevertheless, an excellent judge, a man of great integrity, of extensive information, and in private life a most agreeable and entertaining companion. *See a notice of him in Sabine's American Loyalists*, 431.

[1] Journals of the Provincial Convention, Congress and Committee of Safety.

[2] Life of Peter Van Schaack, by his Son, 64. Letter of Van Schaack, Appendix E.

[3] Journals of Provincial Congress of N. Y. 462, 463. B. F. Butler's Discourse before the Historical Society. 1 His. Soc. Col. 2d series, 43.

the 20th of April, 1777, after the passage of a preamble declaring, among other things, that great inconveniences had attended the mode of governing by a congress and committees, the convention adopted the first constitution of the state. The constitution made no material change in the judicial organization which had previously existed, except the creation of a court of last resort, for the trial of impeachments and the correction of errors, composed of the lieutenant governor, the senators, the judges of the supreme court and the chancellor. It recognized the supreme court, the court of chancery, and the county courts, as existing tribunals, so that whatever doubt may have existed as to the validity of these tribunals, was put at rest by this instrument.[1] On the 8th of May following, the committee of safety sat to organize a government, and elected Justice Livingston chancellor, being the first appointment of such an officer in our judicial annals. John Jay was elected chief justice of the supreme court. Robert Yates and John Sloss Hobart, puisne judges, and Egbert Benson attorney general. First and associate judges were also appointed for the several counties of the state;[2] and on the 17th of October following, the chancellor and the justices of the supreme court were formally commissioned, and entered upon the discharge of their duties, holding courts in the different parts of the state, not in possession of the British, as the public exigencies demanded. On the 23d of October, 1779, an act was passed creating a council or committee for the southern district of the state, composed of the governor, the representatives in the senate and assembly, the chancellor, the justices of the supreme court, the attorney general and the judges of the several counties. As a period would necessarily intervene between the time when the enemy might abandon or be dispossessed of the southern part of the state, and the assembling of the legislature in the city of New York, this council was invested with authority to govern in that part of the state, in the interim. Any seven, of whom the governor was required to be one, were empowered to act for sixty days, from the day that they should be convened in that part of the state, unless the legislature should meet before the expiration of that period.[3] This committee or council were organized shortly after the evacuation of New York by the British, on the 25th of November, 1783, and continued in power until the meeting of the legislature on the 12th of February, 1784, having passed five important ordinances, which were subsequently confirmed and ratified by the legislature.[4] After the close of the war, the supreme court was held respectively at the cities of New York and Albany, the judges performing circuits through the counties as before, for the trial of causes at *nisi prius*. In 1792, the number of justices was increased by the addition of another puisne judge;[5] and in 1794, an additional puisne judge was added;[6] and the court, as thus constituted, with a chief justice and four puisne judges, all of whom held their offices during good behavior, or until they attained the age of sixty years, continued unchanged until the adoption of the amended constitution of 1823.[7] Chancellor Liv-

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[1] Court of N. Y. 1777, xxiv. xxv. xxxii.

[2] Journal of Convention, 910, 916, 918.

[3] Laws of N. Y. 3d session, 1779—96.

[4] Laws of N. Y., 7th session, 1784, Holt's ed. 5.

[5] 21st Dec., 1792, Aaron Burr was appointed, but having declined, Morgan Lewis was appointed in his place.

[6] 29th Jan., 1794, Egbert Benson was appointed.

[7] Graham on Jurisdiction, 144.

ingston continued to serve until he was appointed minister to France, in 1801, when he was succeeded by John Lansing as chancellor, who was succeeded, in 1814, by Chancellor Kent.

The subsequent changes that were made in the judicial organization of the state, before the adoption of the amended constitution of 1846, will be noticed very briefly, as this sketch has extended much beyond the limits originally intended; and some space must be devoted to complete, in pursuance of the original design, the account of the court of common pleas. A very full statement, moreover, of these changes has already been given in Mr. Butler's Discourse before the Historical Society, on the constitutional history of the state; and whatever is required in addition can be readily found in the several editions of the revised statutes, and in Mr. Huff's New York Civil List, now in press, which contains an enumeration of the officers and courts since the revolution.

The constitution of 1823 materially altered the structure of the supreme court, both as respects the number of its judges and the nature of their duties. It provided for the division of the state into judicial circuits, in each of which there was to be a circuit judge, who was to try causes at *nisi prius*, hold the court of oyer and terminer, and discharge all the duties pertaining to a justice of the supreme court at chambers, and it created three justices of the supreme court, a chief justice and two associates, clothed with all the powers of the circuit judges, but who were to constitute a superior tribunal for reviewing the decisions of the circuit courts, the courts of oyer and terminer, and of all inferior jurisdictions. After the adoption of the constitution, the legislature divided the state into eight judicial circuits, corresponding in number and extent with the senate districts, to each of which a circuit judge was appointed.[1] The constitution also provided, that equity powers might be vested in the circuit judges; in conformity with which, an act was passed in 1823,[2] creating equity courts in each circuit, to be held by the circuit judge; but shortly afterwards, distinct courts of equity were abolished, and general jurisdiction in equity concentrated in the chancellor, with equity powers in the circuit judges, as vice chancellors. In 1831,[3] owing to the great increase of equity business in the city of New York, the offices of vice chancellor and circuit judge were disunited, and a separate vice chancellor created for the first circuit. In 1839, in consequence of the further increase of business, an assistant vice chancellor, for the first circuit, was created for the period of three years; but in the following year, 1840,[4] the office was made permanent, and the assistant vice chancellor authorized to hear any cause pending before the chancellor, or before any vice chancellor, and the court of chancery continued thereafter, composed of a chancellor, a vice chancellor of the first circuit, an assistant vice chancellor, with the circuit judges acting as vice chancellors in the other circuits, until the court was abolished by the constitution of 1846. All the judicial officers here referred to held their offices during good behavior, and until they should attain the age of sixty years. The remaining chancellors were, Nathan Sandford, Samuel Jones and Reuben H. Walworth.[5]

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[1] Graham on Jurisdiction, 142.

[2] April 17, 1823.

[3] Laws of 1831, p. 12.

[4] Laws of 1840, chap. 314.

[5] W. J. McCoun was the first vice chancellor of the first circuit. He held the office until he

The courts of common pleas, other than for the city and county of New York, were re-organized after the passage of the constitution of 1823, and consisted of a first judge, who was required to be of the degree of counsellor at law, and four associate judges, all of whom were appointed by the governor. In 1828, the superior court of the city of New York was created, with a chief justice and two associate justices, appointed by the governor and senate, for the term of five years. It was empowered to try all actions at law, without any limitation as to amount, where the process was served in the city of New York; to grant new trials, and generally to exercise all the powers of a court of record, and it was made the appellate court for the review of the judgments of the marine court, and the courts of assistant justices in the city. This appellate jurisdiction, however, was afterwards transferred to the court of common pleas. By subsequent enactments the number of justices was increased to six.[1]

The courts of justices of the peace have undergone too many modifications and changes since the revolution to be noticed in detail. An enumeration of the various acts relating to them will be found in Chancellor Kent's notes to the Charters of the city of New York.[2] In 1807, assistant justice's courts were established in each of the wards in the city of New York, with jurisdiction to the extent of $25. They have also been the subject of many statutory enactments and changes, and are now denominated district courts. In the same year, 1807, a justice's court was created for the city of New York, consisting of three justices, with power to try causes between $25 and $50, and marine causes, between master and mariner, though beyond that amount.[3] In 1819, its name was changed from the justices' court to the marine court. In 1817, its jurisdiction was increased to $100; and, in 1853, it was authorized to try actions of assault and battery, false imprisonment, malicious prosecution, libel and slander, and its general jurisdiction was extended to five hundred dollars.[4]

As there is a chasm in the public records of the city of New York, from the 27th of June, 1774, to the 10th of February, 1784, it is not known whether the mayor's court was held during that period. At the breaking out of the revolution, Whitehead Hicks, an eminent lawyer, was mayor—a position he had held uninterruptedly for ten years. He resigned in 1776, and was appointed a justice of the supreme court, in place of Livingston; but inclining to the republican cause, he went, shortly after, into retirement, and died before the end of the war. He was succeeded in the office of mayor by David Matthews, then an alderman of one of the wards—subsequently tried by a revolutionary committee for a conspiracy against the republican cause, and condemned to death, but reprieved,[5] and who appears to have been acting, afterwards, as mayor, in 1780.[6] Upon the evacuation of the city by the enemy,

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reached the age of sixty, when he was succeeded by Lewis H. Sandford. Murray Hoffman was appointed assistant vice chancellor, and was succeeded by Lewis H. Sandford, in 1843, who was succeeded by Anthony L. Robertson, as assistant vice chancellor.

[1] Laws of 1828, p. 141.

[2] Kent's Notes, xliv. 261.

[3] Laws of 1807, chap. 139.

[4] Laws of 1853, chap. 617.

[5] Minutes of the Trial and Execution of certain Persons for Conspiracy against the Liberties of America. London, J. Burr, 1776.

[6] 2 Dunlap, App. ccxxxiv. ccxli. Valentine's Manual of City of New-York, for 1853, 409 and 410.

measures were taken to reorganize the municipal government. In the beginning of 1784, James Duane was appointed mayor, by Governor Clinton, and Richard Varick, recorder, and the mayor's courts and the courts of sessions were re-opened. Immediately upon his appointment, Duane framed a series of thirty five rules, to regulate the practice of the mayor's court, which he convened on the 10th of February, 1784, a few days after his appointment; and, after publicly adopting the rules, and breaking up the monopoly which, for over half a century, had limited the practitioners of the court to eight, by an order authorizing all attorneys of the supreme court to practice in it, he adjourned the court for three weeks, to afford an opportunity for the issuing and return of process. Upon the adjourned day, 24th of February, 1784, Colonel Varick took his seat as recorder, with Duane, and the regular business of the court was resumed. On that day, one hundred and sixteen writs were returned, and the leading practitioners who appeared to prosecute, or answer to them, were Alexander Hamilton, Aaron Burr, Colonel Troup, William S. Livingston and William B. Livingston. On the next adjourned day, there were one hundred and sixty-seven new writs returned, and, at the session in July, there were one hundred and ninety-eight.[1] The concentration, at once, of this large amount of business in the court—which was quadruple that of the supreme court, and embraced actions of all kinds and descriptions—was owing to the great confidence felt in the legal ability of Duane, and the facility afforded, by the frequent sessions of the court, for the speedy dispatch of business. From his learning, industry and capacity, Duane had attained a high rank in his profession before the revolution, and was in large practice when that event took place.[2] Through the whole of the war, he had been a member of the provincial congress of New-York, of the committee of safety, and of the convention that adopted the constitution of the state, and a delegate to the continental congress. He was a member of that body at the time of the signing of the Declaration of Independence, though then attending the provincial congress of New York, was afterwards a member of the celebrated committee appointed to state the rights of the colonies, and framed the preamble and resolutions reported by it, and adopted by congress, and he was one of the special committee of three, in 1777, that prepared the final draft of the articles of confederation. The high character of Duane drew into the court every lawyer of ability; and, for more than a quarter of a century afterwards, it became, in view of the men who presided in it, and of those who practiced before it, not only the leading court in the city, but one of the most eminent judicial tribunals in the state. During the mayoralty of Duane and Varick, and while Samuel Jones—father of the late chief justice—Chancellor Kent and Richard Harrison were successively recorders—that is, until the close of the year 1800: the leading practitioners in the court were Alexander Hamilton, Aaron Burr, Colonel Troup, Edward Livingston, Brockholst Livingston,[3] Egbert Benson, Morgan Lewis and Josiah Ogden Hoffman;[4] all of them, at the commencement of this period, young men, whose first forensic efforts were made in the mayor's court.

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[1] Rec. of Mayor's Court, for 1784.

[2] 4 Doc. History, 461. Jones' Memoir of Duane.

[3] Judge of the Supreme Court of New York, until 1806, and from that year, until 1823, one of the associate justices of the Supreme Court of the United States.

[4] Father of Ogden Hoffman, Esq. Attorney general from 1795 to 1802, and associate justice of the New York Superior Court, from its creation until his death.

In fact, so popular was the court, so great the confidence felt by suitors and by the profession, that although it was in the power of the defendant to remove a cause into the supreme court for trial, where the amount exceeded £20, the privilege was rarely resorted to; and its records show, that cases presenting questions of the highest importance, and involving large amounts of property, were constantly adjudicated before it.

Burr got more rapidly into practice than Hamilton. The extent of a lawyer's business, at that time, was judged by the number of writs he sued out or to which he appeared; and at the first day of the session of the court, in July, 1784, Burr prosecuted or appeared to seventeen writs. Hamilton's, at the following term, amounted to thirteen; but William S. Livingston exceeded both of them, in the amount and variety of his business. At a single session, in July, he answered to sixty seven writs. At the preceding May term, Cornelius Bogert was admitted to practice, upon the production of a license from the supreme court. He is the first lawyer whose name appears upon the rolls as specially admitted; and after the lapse of seventy years is still alive, having retired but recently from the active pursuit of his profession.

The first case in which Hamilton appeared, and one of the most important judgments of Duane, was *Rutgers* v. *Waddington*, a case which brought under discussion the powers of the confederated states and the rights of the individual states, and which is especially interesting, as it first drew Hamilton's attention to the consideration of principles growing out of the union of the states, and the establishment of independence, principles which he afterwards elaborated in the discussion of the National Convention of 1787, in the papers of the Federalist, and in the debates of the New York Convention of 1788; and which were subsequently embodied in the constitution of the United States. In 1783[1] an act was passed providing, that any one who, by reason of the invasion of the enemy, had left his place of abode, might bring an action of trespass, and recover damages against any person who had occupied it, or had injured his real or personal property, or against any one who had received his goods or effects, while the same was under the control of the enemy; and prohibiting the defendant from pleading or giving in evidence, as a defence, that the property was occupied, injured or destroyed by a military order or command. The action, which was the first under the statute, was brought to recover six years' rent for the occupation by the defendant, of a brew house in the city of New York, while the city was in the possession of the British. The defendant plead the possession of the city by the British army; a license from the commissary general, in 1778, to him, a British subject, residing in the city for the purposes of commerce, to use and occupy the premises until the 30th of April, 1780; and a direct authority from Sir Henry Clinton, the commander in chief, to do so, after that period; and also the treaty of peace, ratified at Annapolis, on the 14th January, 1784, by which all claims that the citizens or subjects of either of the contracting parties might have against each other, for indemnity for injury or damage done to the public or individuals, during the war, was relinquished and released; to which the plaintiff demurred. To enact, after articles of peace had been agreed to, that one belligerent might maintain an action against another, to recover damages

[1] March 17, 1783. Laws of N. Y. 1783. 6 Sergt. McKesson's edition, 284.

for injuries or loss occasioned by the war, was without precedent in the history of nations, and can be explained only by the intense bitterness felt towards the tories by the revolutionary party in New York, who had suffered so heavily, in a pecuniary point of view. From the importance of the principle involved in the suit, and the large number of cases, covering claims to an enormous amount, that depended upon it, it excited a degree of interest that no single case in this state has ever produced. The defendant, in addition to William S. Livingston and Morgan Lewis, retained Hamilton, who had then no rank or position as a lawyer, for having been engaged throughout the war in the army, he had begun to study law but little more than a year previous, was then but twenty seven years of age; and his defence in this case was the first exhibition of those extraordinary powers afterwards brought into play upon a wider theatre. For a man ambitious of legal fame or reputation, he had every stimulant to exertion, for the full weight of public opinion was against him, the excitement that prevailed not being confined to those who had a pecuniary interest at stake, but extending to the whole community. The revolutionary struggle had just been brought to a close; the city was still in a disordered state, and the antagonistic views in respect to the course and policy of government, which afterwards led to the formation of the federal and democratic parties, had already become a subject for public agitation. The interest, moreover, in this particular case, was heightened by the relative position of the parties, the defendant being a wealthy merchant, and a British subject, who had adhered throughout to the cause of the crown; while the plaintiff was a poor widow, who had lost every thing by the war; and, as if nothing might be wanting to give it an imposing effect, and excite the popular feeling, the attorney general appeared on behalf of the plaintiff, in connection with her counsel, Col. Troup and Messrs. Lawrence and Wilcox; and the argument took place before a crowded auditory, in a hall which had been desecrated and defaced by the British troops. Six of the counsel engaged were heard upon the argument, but the leading points were discussed mainly by Egbert Benson, the attorney general, and Hamilton. Hamilton contended in opposition to the attorney general, who relied upon the statute and upon the right of the state, in its sovereign capacity, to pass it; that the act was in violation of the law of nations, which, being part of the common law, had become, by the constitution, the law of the state; and followed it up by an elaborate and masterly exposition of the rights of war, and of the relation of belligerents to each other, in their capacity as individuals, when the war is put an end to. He claimed that the defendant was covered and protected by the treaty, and insisted that it was not in the power of the state to deprive him of that which the treaty had secured to him. The general congress had become a party to that treaty, and if they could not violate it, the state could not. The attorney general urged, that each state was an independent sovereignty, in respect to its own citizens; that it had the power to pass laws to regulate their rights, or fix their liabilities; and that it might enact a law affecting the property or person of any one within its jurisdiction, the sovereignty of the people of each state, in that respect, being absolute and beyond control. To which Hamilton answered, that if such was the case, then the confederation was but the shadow of a shade; and he went into an examination of the nature of the Union, and the principle of popular sovereignty.

The sovereignty of the people, he said, began by the compact which united them together in the attempt to throw off the sovereignty of Great Britain and to establish their own. They were not an aggregation of states, each independent of the other,

but had confederated together for a common object, and by the articles of confederation, had vested in a general or national congress certain powers, essential to the due administration of their affairs in their united or confederate capacity. The external sovereignty of the United States could only be recognized by a foreign nation, as it was represented by the states, in their confederate character, and that was through the national congress, composed of delegates sent from the separate states, and which represented the whole people. A state was prohibited from going to war, except in cases of actual invasion, or of a threatened invasion from Indians, or of making treaties with foreign nations. The general power of making war, or of concluding peace, or of entering into treaties, being vested exclusively in the national congress. The making of the treaty was consequently within the power of congress; it bound each state, and no state could pass a law repugnant to it, or which would violate any of its provisions.

The attorney general claimed, that whatever might be the nature of the confederation, it could exist only by the consent of the states, as long as they saw fit to continue members of it; and that if a state thought proper to return again to its original sovereignty, it had the power to do so. To this Hamilton replied by an argument, then advanced for the first time, and which has ever since been regarded as the principal one, in support of the indissolubility of the Union, and was relied upon during the discussion of the question of nullification, by Webster and others, as unanswerable. The state of New York, he said, was a party to the declaration of independence, and also to the articles of confederation. The first was a league entered into by the thirteen colonies, by which they cast off their allegiance to the crown of Great Britain, and, as united colonies, declared themselves free and independent; and the other was an agreement, which, by its terms, was for the formation of a "perpetual union." As separate states, they had, therefore, entered into a contract for purposes expressed in the instrument, by which the contract was formed, and like any other contract, no one party to it could withdraw or be released from its obligation without the general consent of the whole. To the objection that the mayor's court, as a state tribunal, could not disregard a law of the state, though it might be in conflict with what had been done by the national congress, he answered, that the articles of confederation having made no provision for the establishment of a judiciary, except in cases of disputes between states, or in cases of captures or of felonies upon the high seas, the state tribunals must, of necessity, recognize judicially, and carry out the measures of the national congress.[1]

In delivering his judgment, Duane noticed the uncommon ability with which the case had been argued, particularly by Hamilton and the attorney general. He held, that the defendant was liable for the rent of the premises for the first three years, as its use, during that period, could not be regarded as having any relation to the war. The license from the commissary general, conferring upon the defendant no right to the possession, that officer having no authority to grant one; but for the remaining three years, during which it was held under an order from Sir Henry Clinton, to whom, or to whose agent, the rent had been annually paid, he held, that the defendant was not liable. By the law of nations, restitution of the rents or issues

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[1] Rec. of Mayor's Court, 1784. Papers in Rutgers v. Waddington, on file in the Court of Common Pleas. Synopsis of Hamilton's Brief, in 2 Hamilton's Life, by his Son, p. 244. 2 Davis' Memoirs of Burr, 45. 4 Doc. Hist. of N. Y. 641.

of houses or land, collected *bona fide*, under the authority of a commander in chief, while in the possession of the city, during a state of war, could not be enforced. The law of nations had become, by the state constitution, the law of the state; and must be regarded as a fundamental law, applicable to and in force throughout the whole confederacy. By the federal compact, the states were bound together as one independent nation. In respect to each other, and in their national affairs, they exercised a joint sovereignty, the will of which could only be expressed by the acts of the delegates of the separate states in congress assembled. Abroad, the states could only be recognized in their federal capacity; and having combined together and formed a nation, they must be governed by the law of nations. No one state could arrogate to itself the right of changing at pleasure those laws which are received as a rule of conduct by the common consent of the civilized world.

For a separate state to alter or abridge any one of the known laws of nations, was contrary to the nature of the confederacy, in conflict with the intention of the articles, and dangerous to the Union. The defendant was residing in the city in pursuit of his private affairs, taking no part in the acts of the military; and to hold under the statute, that he could not plead as a defence that he had paid for the use of the premises, to those who, in the plentitude of military power, were exercising dominion over the city, was such a clear violation of every principle of right, that it was not to be presumed that such was the intention of the legislature. It was not to be presumed that it was their intention, by the generality of the terms employed in the act, to repeal the law of nations, and violate the compact of the confederacy; it being a familiar rule, that where two laws were in any of their provisions repugnant to each other, the latter was not deemed to be a repeal of the first, unless the intention to do so was clear and unmistakable. Even if such was the intention in the passage of the act, the state had no power to make such a law. The power to go to war and to make peace was vested in the national congress. They had concluded peace by a solemn treaty, and peace worked an oblivion of the past. Nor was it necessary to inquire whether the particular amnesty embodied in the treaty would meet the defendant's case, for his defence rested upon a right, included and protected by that general amnesty or immunity thereafter, for any act done during, or having relation to the war which, as between belligerents, is implied in every treaty of peace, whether expressed or not. The treaty bound the whole confederacy, and every state, and no member of the compact could alter, abridge or impair it.[1]

When the decision was made known, it was followed by a burst of popular indignation. A public meeting was called a few days after, and an address to the people of the state adopted, said to have been prepared by Melancton Smith, a prominent lawyer, and afterwards the leader of the anti federal side, in the state convention that ratified the national constitution; in which, after acknowledging the uncommon ability and learning displayed in the argument, and while conceding the necessity of the independence of courts of justice both of the people and of the legislature, the address denounced the decision as a violation of the privileges of the people, and as an act of judicial tyranny, and closed with a resolve to carry the case, on behalf of the plaintiff, to the court of errors. Nor did the agitation end with the adoption of this

[1] Argument and judgment of the mayor's court of the city of New York, in a cause between Elizabeth Rutgers and Joshua Waddington, New York. Samuel Loudon, 1784, in tracts, collected by the late Thomas B. Chandler, D. D., and vol. xxxiii. pamphlet No. 8, and now in the possession of Edward B. Corwin, Esq., of New York. Rec. of Mayor's Court, for 1784, Aug. 27.

address, but the subject was brought before the legislature, and a resolution passed, declaring the decision to be subversive of all law and order, and calling upon the council of appointment to appoint such persons mayor and recorder as would be governed by the law of the land. Waddington, in view of the threatened appeal, compromised the claim, but the decision of Duane settled the law, and the act was afterwards, in effect, repealed upon the motion of Hamilton, in 1787.[1] Duane continued to preside in the court until he was appointed by Washington, after the organization of the United States' courts, towards the close of 1789, district judge of New York, when he was succeeded by Col. Varick, as mayor. During the six years that he sat in the court, he delivered a number of important decisions, nearly all of them affirmed by the supreme court. Some of them are to be found in the early volumes of Johnson's Cases, but as our reports do not begin until ten years after he ceased to act, very few of his decisions have been preserved.

In the thirty five years that followed, the mayors and recorders who sat in this court and in the court of sessions, embraced a succession of the most eminent men in the state, all of whom, with one exception, were distinguished lawyers. During this period the mayors of the city were, Edward Livingston, De Witt Clinton, Col. Marinus Willet, Jacob Radcliffe and Cadwallader D. Colden; and the recorders, Samuel Jones, father of the late chief justice, James Kent, Richard Harrison, John B. Prevoost, Maturin Livingston, Pierre C. Van Wyck, Josiah Ogden Hoffman, Jacob Radcliffe, Peter A. Jay and Richard Riker. In 1802, Edward Livingston, the well known author of the criminal code of Louisiana, who was then mayor, prepared and published a small volume of reports.[2] It contains thirty nine cases, very concisely reported, somewhat in the manner of Anthon's *Nisi Prius*, nearly all of them upon questions of importance. As the volume was intended for private distribution, but a small number of copies were printed, and it is now exceedingly rare, no copy existing even in our public libraries.

During the mayoralty of De Witt Clinton, and the recordership of Maturin Livingston, Clinton, either through choice or from the increasing duties of his office, ceased to preside in the mayor's court; and from that time until 1821, the recorder sat as the presiding judge of that court, and the mayor as presiding judge of the court of sessions, the recorder being the recognized head of the one, and the mayor of the other. In 1821, it was concluded, from the increasing importance of the mayor's court, and as the mayor had long ceased to preside in it, that a name denoting its municipal origin should be abandoned, and a permanent law judge appointed. Accordingly, an act was passed, changing its name to the court of common pleas for the city and county of New York,[3] and creating a first judge, to hold his office during good behavior, or until he should attain the age of sixty years; but by the constitution which was adopted one year later, the tenure of the office was changed to five years, and the power of appointment theretofore lodged in the council of appointment, was vested in the governor. The mayor, recorder and aldermen were

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[1] Laws of N. Y. 1787, 10 Ses. McKisson's Ed. p. 182.

[2] Judicial Opinions delivered in the Mayor's Court of the city of New York, in the year 1802. FORSAN ET PACE OLIM MEMINISSI JUVABIT. New York: D. Longworth, 1803. Many of the decisions of the Mayor's Court, moreover, will be found in the volumes of the City Hall Recorder.

[3] This act was drawn by John Anthon, Esq., then the most prominent practitioner in the Mayor's Court.

still authorized to sit in it; but the first judge was empowered to hold the court without them, and it was made his especial duty to hold it.[1] After the passage of this act, John T. Irving was appointed first judge; and upon the appointment of Judge Irving, though no provision to that effect was contained in the act, Stephen Allen, who was the mayor, ceased to preside in the court of sessions. Recorder Riker, who had sat for some years in the mayor's court, took the mayor's place as presiding judge of the sessions; and Judge Irving sat alone as judge of the court of common pleas; neither the mayor, recorder or aldermen, though entitled to do so, taking any part thereafter in its proceedings, except when all the judges were convened, in what, by virtue of the act of 1821, was denominated the county court. This tribunal, composed of the first judge, the mayor, recorder and all the aldermen, was occasionally convened for the impeachment and trial of officers of the municipal government, the first judge acting as presiding officer, until it was abolished by the constitution of 1846. Judge Irving presided alone in the court for thirteen years, during which time the leading practitioners before him were John Anthon, Martin S. Wilkins, Elisha W. King, John T. Mulligan, Robert Bogardus, Pierre C. Van Wyck, Thomas Phoenix, Joseph D. Fay, David Graham, sen., Hugh Maxwell, John Leveridge and William M. Price, though the members of what was then known as the senior bar. Thomas Addis Emmet, Peter A. Jay, Peter W. Radcliffe, Samuel M. Hopkins, David B. Ogden, William Slosson, William Samson and others, appeared frequently in the court, as associate counsel in important cases. Judge Irving continued to preside as first judge until his death, in all, seventeen years. As a judge he was in many respects a model for imitation. To the strictest integrity and a strong love of justice, he united the most exact and methodical habits of business. Attentive, careful and pains taking, few judges in this state ever have been more accurate or perhaps more generally correct in their decisions. While presiding at *nisi prius*, he was not what would be termed a quick minded man; but when questions were argued before him in *banc*, he bestowed so much care, and considered each case so attentively, that his judgments were rarely reversed, and were uniformly treated by the courts of revision with the greatest respect. He shared, in common with his more distinguished brother, Washington Irving, a talent for literary composition, and wrote with great elegance, ease and perspicuity. In early life he gave promise of attaining a distinguished rank as a writer, and published in the newspapers of the day, in addition to other compositions, many poetical effusions upon political subjects, remarkable for their point, brilliancy and satire; but his weighty judicial duties—the close application to which, no doubt, shortened his life—left him no leisure; and he appears to have lost all taste thereafter for literary pursuits. Upon his death, the bar caused a handsome marble tablet, with his bust in *relievo*, and a suitable inscription, to be placed in the court room, as a mark of respect for his memory.[2]

In 1800, the terms of the court of sessions were changed to six times a year, and,

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[1] Laws of New York, 1821, chap. 72.

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VIRO · HONORATO
IOANNI · T · IRVING
QVEM · JVDICIS · OFFICIO · MVLTOS · PER · ANNOS · FVNCENTEM
ET·LEQVM·DOCTRINA·ET·MORVM·INTEGRITAS·FELICISSEME·CONDECORABANT
IVRISCONSVLTI · NEO-EBORACENSES · QVIBVS · ET · AMICI · ET · MAGISTRI
TAM · TRISTE · RELQVIT · DESIDERIVM
H · M · PONENDVM · CVRAVERVNT

in 1813, were directed to be held monthly. In 1850, a city judge was created with the same powers as the recorder. In 1847, the power of the aldermen to sit in the court of common pleas was taken away; and by the amended charter of 1853, they are no longer entitled to sit in the court of sessions.

As any cause might be removed for trial from the mayor's court to the supreme court by *habeas corpus* or *certiorari*, where the amount involved exceeded £20, an act was passed in 1789, forbidding their removal, except in certain cases,[1] unless the amount exceeded £100 ($250). In 1823, this was increased to $500.[2] In 1837 it was further increased to $2,500,[3] and in 1844, the power to remove any cause was taken away, and the jurisdiction of the court remained thereafter unlimited in amount.[4]

In 1834, an associate judge of the court of common pleas was created, who was vested with all the powers of the first judge, and Michael Ulshoeffer was appointed to the office. In 1838, upon the death of Judge Irving, Judge Ulshoeffer was appointed first judge, and Daniel P. Ingraham associate judge. In 1839, an additional associate judge was created, vested with all the powers of the other judges, and William Inglis appointed. In 1844, Charles P. Daly was appointed in place of Judge Inglis, and the court, as thus constituted, a first judge and two associates, remained until the adoption of the constitution of 1846. By that instrument, the court of common pleas and the superior court of the city of New York were specially excepted from the general judicial re-organization of the state, but by an act passed in the following year,[5] it was provided that the terms of the judges of both courts should expire on the 17th January thereafter, and that an election of judges by the people, for each of the courts, should take place in the June preceding; that the terms of the judges elected should be classified in terms of two, four and six years, to be determined by lot, and that the election of all judges thereafter, in either of the courts, should be for six years. In June, 1847, all the existing judges of the common pleas were elected, and the allotment of terms resulted as follows: Michael Ulshoeffer, two years, Daniel P. Ingraham, four years, and Charles P. Daly, six years. In 1849, Lewis B. Woodruff was elected in place of Judge Ulshoeffer, and in June, 1850, Daniel P. Ingraham was appointed first judge. In 1851, Judge Ingraham was re-elected for six years, and in 1853, Charles P. Daly was re-elected for a similar term.

By the judiciary act of 1847, by the code passed in 1848, and amended in 1849, 1851 and 1853, the court of common pleas exercises unlimited jurisdiction, in law or equity, where the defendants reside, or are personally served with process, in the city of New York, or where one or more defendants, jointly liable upon contract, so reside, or are personally served in the city. It has also jurisdiction against corporations, created by the laws of the state, who transact their general business, or keep an office for the transaction of business, in the city of New York, and against foreign corporations, upon any cause of action arising in the state, or for the recovery of any debt or damages, whether liquidated or not, arising upon a contract made, executed

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[1] Laws of 1844, 30.
[2] Laws of 1847, 279.
[3] Laws of 1789.
[4] Laws of 1823.
[5] Laws of 1837, 547.

or delivered within the state. By the code, certain actions are required to be tried in the county where the subject matter of the action is situated, or the cause of action has arisen in the county; of which actions the court has jurisdiction, irrespective of the residence of the parties, or the personal service of process. They embrace actions for the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest; for injuries to real property; for the partition of real property; for the foreclosure of a mortgage of real property; for the recovery of personal property distrained; for the recovery of a penalty or forfeiture imposed by statute, except where it is imposed for an offence committed on a lake, river or other stream of water, situated in two or more counties; in which case, the action may be brought in any county bordering on such lake, river or stream, and opposite to the place where the offence was committed; and actions against a public officer, or person specially appointed to execute his duties, for an act done by him, in virtue of his office, or against a person who, by his command, or in his aid, shall do any thing touching the duties of such office. And by the judiciary act, as well as by an act passed in 1854,[1] the court also possesses jurisdiction, in special proceedings, for the disposition of the real estate of infants, where such real estate is situated in the city of New York; the care and custody of the persons and estates of lunatics, persons of unsound mind, or habitual drunkards, residing in the city; the mortgage or sale of the real estate of religious corporations, and in the admeasurement of dower, in lands within the city. And an appeal from its judgments or determinations, except in an action originally commenced in the marine or a justice's court, lies directly to the tribunal of last resort, the court of appeals.[2]

The court of common pleas is made by the code the court of review, from the judgments of the marine or the district justices' courts of the city, and its decision upon an appeal from any of these courts is final.[3] It has, also, exclusive jurisdiction in proceedings upon liens against real estate, under the act passed in 1851, "for the better security of mechanics and others erecting buildings and furnishing materials therefor, in the city and county of New York," except that when the lien is docketed for a sum not exceeding one hundred dollars, proceedings may be instituted in the marine court, or in a justice's court in the judicial district where the building is situated.[4] And, also, the exclusive power of remitting fines imposed by the court of sessions as penalties, or of relieving against or remitting judgment entered upon forfeited recognizances under the statute.[5] And of entertaining proceedings supplementary to execution, upon judgments recovered in the marine and district courts in the city, where a transcript of the judgment is docketed with the county clerk, and the amount recovered exceeds, exclusive of costs, twenty five dollars.

In 1854, an act was passed, creating a clerk of the court, to be appointed by the judges; the clerk of the county having theretofore been the clerk both of the supreme court and of the court of common pleas, and to remove all doubt as to the general powers and jurisdiction of the court, this act affirmed its powers in remitting

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[1] Laws of 1854, 464.
[2] Code, 1852, § 33, 123 and 124.
[3] Code, § 11, subdiv. 4, § 34.
[4] Laws of 1851, 953.
[5] Laws of 1844, p. 469. Laws of 1845, p. 250. Laws of 1854, p. 464.

fines and recognizances; in correcting and discharging the dockets of liens and judgments entered upon recognizances; affirmed all its previous powers; conferred upon it all the powers then or thereafter to be vested in the county courts; and generally confirmed its powers as a court of original and general jurisdiction, to the same extent as they were had and exercised before the adoption of the constitution of 1846.[1]

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[1] Laws of 1854, p. 464.

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